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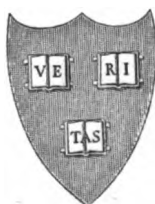
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THE
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NOVEMBER, 1856.  
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THE RIGHT OF EMINENT DOMAIN.¹

No. II.

We have thus far endeavored to show eminent domain to be a right, the quantity of that estate which the sovereign holds in the property of the subject, and its constitutional modifications in this country, if any such exist. We are next to consider with whom this power resides.

Eminent domain is said to be

"A Right WHICH BELONGS TO THE SOCIETY OR SOVEREIGN."

In communities which have not irrevocably yielded all the powers of the State to princes or hereditary rulers, this power will be found subsisting in its natural state, in the people at large. Its exertion and all the concurring incidents of its exercise are to be measured and restrained by their discretion only. But as no community can long exist without recognizing some fundamental principles of self-control, which shall regulate the otherwise impulsive manifestations of popular will, it naturally follows, that even in the

¹ Continued from vol. IV., p. 641.

most ultra democracies, restraints and safeguards are involuntarily thrown around the exercise of this right, which of all powers may be made most intolerable to the governed, to prevent its oppression of the subject. In our own country, the people in their original omnipotent power, have wisely imposed on themselves the observance of those fundamental rules, which to them seem the most likely to insure the true end of government. They have endeavored to fetter the attributes of sovereignty, so far only, as may prevent their abuse and confine them within the limits of justice. They have erected the departments of government by which the process of enacting, expounding, and enforcing the laws shall be carried on, and as a necessary consequence, the powers without which it would be impossible to effect the object the people had in view in establishing the government, are retained by and become part of the power of that department, which, by its functions, is entitled to their exercise; and though the people may modify or amend their constitutional restrictions, enlarging or diminishing the authority of their instruments of government, yet whatever the functions retained by those departments, if to any of them eminent domain is an essential, a proportionate amount or extent will attach to and become a part of those powers.

Previous to the formation of the constitution of the United States and those of the several States, this, together with the other attributes of sovereignty vested in the people at large;¹ but under our present form of government, the eminent domain, within constitutional restrictions, rests with the legislatures of each State,² and, so far as the functions of the general government may require it, with Congress also. As it rests with these bodies, they of course must be the judges of the proper occasion for its exercise, and it must be entrusted to their wisdom to determine when public uses or necessities require the assumption of private property.³ As these bodies most immediately emanate from, and are nearest to, the general private interest, it is a wise distribution of the functions of gov-

¹ 4 Wheat. 651; 8 Wheat. 584; 2 Peters' S. C. 656.

² 7 West. L. J. 260; 8 Paige, 74; 9 Barb. Sup. C. 350.

³ 5 Hayw. 97; 18 Pick. 501.

ernment, that a power so dangerous and easy of abuse, should be reposed in those who from interest will jealously repel such abuse; but if they should either wantonly, or in a mistaken view of their own powers seize the goods of a citizen, it would be an assumption of power the courts would not hesitate to pronounce unconstitutional and void.¹

It is said this right rests as a general rule with the legislatures of the States,² or the general government; the exceptions are not such strictly, but refer more particularly to those cases where the legislative body, from an inability to determine accurately what the public interest certainly requires, have transferred their discretion to subdivisions of the State authority, as to the collectors of taxes; or to private enterprise, as private companies for public improvements. Either of these latter, then, to an extent, exercises not only the power of taking, but also of determining to a certain extent, what is required. It may correctly be said that it is a parceling out to sub-agents, a delegated authority.

Although the word sovereign is correctly applicable to a people acting from the dictates of their own supreme will and accountable to no one, yet we think Vattel had in view, in this use of it, a contradistinctive signification to the sense of the word "society," and intended to designate those forms of government which are entirely independent of popular will; or at most, remotely or indirectly influenced by it; as in the limited monarchy of Great Britain, in which the king and parliament are the supreme power of the land, and necessarily with them in general rest the attribute, and exercise of the right of eminent domain.³ Yet it would seem for some purposes, this power is among the rights of prerogative. The king has the right without consulting parliament, to erect franchises which in their nature must interfere with the claims of private persons, and this upon the writ of *ad quod damnum*, the name of which

¹ 2 Kent, 339.

² 2 Kent, 338-40; 7 Greenl. 292; 2 Porter, 296; 8 Paige, 45; 18 Wend. 9; Rice, 383.

³ 4 Inst. 36; 1 Black. Com. 51.

would tend to confirm the opinion ; which writs running in the name of the king were to inquire, " If it be to the damage or prejudice of us or others ; then to what damage and what prejudice of others."¹ The same writ has also been made use of in this country.² The crown might of its own motion, on such writ, so determining the damages which would accrue to itself or others, establish a ferry, market or license the cutting of a canal through the lands of another, or the taking of such species of property as may be necessary to the defence of the realm.³ It has been usual however, in England, for this right to be exercised under the sanction of an act of parliament, particularly in the case of some new application of private property to public uses, as in the early experiments and adoption of the railroad system in that country ; but when experience has demonstrated that the public interest can be subserved in an eminent degree by such new application of private property, general acts have been passed under which private capital and enterprise has been encouraged into investments beneficial to the public. Such is the Land Clauses Consolidation Act of 8 Vict. c. 18, which provides that lands may be taken under certain conditions and restrictions, and comprises in one general act sundry provisions usually introduced into acts of parliament relative to the acquisition of lands required for undertakings of a public nature, for the purpose of avoiding repeated legislation on similar subjects:⁴ most of the United States have general enactments for the same purpose.⁵

We have now said all we propose to do as to the particular departments of government in which this power resides, and we come to an important division of our subject, if one part can be said to be more so than another.

We have found the eminent domain of a State to consist in a right which belongs to the society or the sovereign ; we are now to consider the manner in which that right may be properly mani-

¹ 2 F. N. B. *Ad quod Dam.* 221.

² 9 Dana, 114.

³ 2 Vin. Abr. 126 ; 10 Coke's R. 142 : Cro. Chas. 266 ; 1 Black. Com., Chitty's Ed. 189 n.

⁴ 2 Chitty's Col. Stat. 807.

⁵ 11 New Hamp. 19.

fested; and this we deem finds an appropriate place under that phrase of our definition which terms it

*“A Right of DISPOSING.”*¹

When it is determined that the welfare of the public for any purpose whatever requires any property in the possession of the subject to be surrendered to or disposed of by the State, there are certain means by which the public good can be best subserved, and conditions upon which only can the right be exerted.

As the State in its national capacity cannot itself immediately apply the thing taken to the intended use, it is necessary in this as it is in all other manifestations of national will, that the purposes of the sovereign be reached or effected through the instrumentality of agents.² These may be either such as by their official connection with the State are entitled to exercise a species of this right, as the collector of the revenue or rates, or corporations of individual enterprise, by which latter it is supposed objects of improvement would be accomplished with more economy and less danger to the community than if retained in the hands of the State.³ The object in delegating the power is the public benefit to be derived from some contemplated undertaking, and the State in consideration of this, delegates its right to take, as regards a particular property, sufficient to attain the desired improvement.⁴ All such persons, therefore, enjoying or exercising any part of the right of eminent domain so far represent, and are trustees for the public.⁵ Such are ferry, bridge, canal and railroad corporations, all of which, though private corporations, are a public use.

The grants of this power are either express or implied.⁶ Of the first, an example is the charter to a bridge or railroad company wherein the legislature or power authorized to confer this right, at length set forth the causes which have moved them to the delegation of authority to take property. The second is of an extraordinary

¹ John. Dic., *To dispose of*; Web., *Ibid.*

² 8 Dana, 296; 3 Paige, 45; 9 Barb. Sup. C., 555.

³ 3 Hill. S. Car. R., 105.

⁴ 3 Paige, 74.

⁵ 25 Wend., 174.

⁶ 7 West. L. J., 260; 11 N. H., 25; 18 Pick., 501.

nature, and springs out of the immediate exigencies of particular circumstances, as the right of the public to pass over adjoining lands in avoiding a foundeours highway, or destroying a less valuable property to preserve that of greater value, or to preserve life. In these latter cases, the maxim "*Salus populi, suprema est lex,*" has a most forcible application.

Of the construction of express grants, it will be impossible to say more than we can do in a few lines, however much we might wish to examine and profit by the able and elaborate discussions which the subject has provoked. It has been among the most perplexing questions ever brought into our courts,¹ though now it would seem to be settled. Some courts have held, and with great show of plausible reasoning, that the grants of the public should receive the same construction as the grants of individuals; while others have as strenuously held, on the principle that if either party should be benefited from the ambiguity of a contract or allowed an advantage from any uncertainty in it, it should rather be the public than the individual, that public grants should be construed strictly. The question has been decided variously in different courts, but the settled principle of law is in favor of a strict construction.²

Such is the rule adopted by the Supreme Court of the United States.

The measures necessary to transfer private property from the individual to the public use, are matters of discretion with the legislature, and are provided for in the special act or by some general law;³ this, however, will more aptly be considered under the head of compensation. We may say, in concluding this part of our subject, that it is difficult to lay down any general rule that would precisely define the power of government in the exercise of the acknowledged right of eminent domain. It must be large and liberal, so as to meet the public exigencies; and it must be so limited and restrained as to secure effectually the rights of the citizen. It must depend in some measure upon the exigencies as they arise and the circumstances of particular cases.⁴

¹ 9 Geo., 524.

² 7 Pick., 434-8; 11 Peters' S. C., 420; 6 How., 796.

³ 11 N. H., 19.

⁴ 23 Pick., 394.

There are, however, two essential conditions or limitations to the exercise of this right. One is the *public welfare*, which requires the interest of the individual to yield to its paramount claims. The other is the *right to compensation* which accrues to him from whom the property is taken when transferred to the State.¹ A provision for the latter is a necessary attendant on the due and constitutional exercise of the lawgiver to deprive an individual of his property without his consent, and is laid down by jurists as an acknowledged principle of universal law.²

The right which belongs to the State, of seizing private property, is, in definitions of it, placed upon the stringency of public necessity. It would seem, in such definition, as if the right of the State only was in view, as in terms it has but the limitation of necessity, yet all jurists acknowledge the moral obligation incurred by the State to make compensation.

That princes did frequently seize the property of their subjects under pretexts of public uses, history abundantly testifies. It was in protection of the English people that the clause of the 29th chapter of Magna Charta of Henry III declared "That no man's lands or goods should be seized into the king's hands against the great charter and the law of the land."³ Magna Charta and its confirmatory statutes are regarded as the basis of the English constitution, and into them has been incorporated and from time to time re-enacted and confirmed by her different sovereigns this provision, making it a fundamental principle of the government; yet the avarice of her rulers have been such that at different times the safety and continuance of her constitution has been sadly endangered. One of the principal causes of complaint so late as the third parliament of Charles I, was the exaction of money in the form of forced loans and benevolences, which resulted in the petition of right; but a repetition of which acts of tyranny cost him both his throne and life.

So far as this extends, it serves to restrain oppressive exactions by one department of the government, and to assure to the subject

¹ 2 Par. Cont., 524; Grot., B. 8, ch. 19, § 7; Puff., B. 8, ch. 5, § 3, 7.

² 2 Kent., 339.

³ 2 Inst., 45; 1 Blac. Com., 89.

nature, and spring deprived of his property by due course of law; circumstances, the parliament of England by their statute seize upon lands in avoimerty to public uses, there is nothing more binding valuable property to compensate the owner than the moral obligation of life. In these. They are so transcendent and absolute, that their *lex*," has a must not be confined either for causes or persons within

Of the cor' but the natural equity of indemnity does in almost more than prevail, and parliament rarely, if ever, and never to exarv, by this means inflicts an act of injustice, so much weight has the principle of universal justice.²

In this country the rights of private property are guarded in the securest manner. Our agents to whom are entrusted the exercise of this power, are prohibited by provisions in the Constitution of the United States which applies to all acts of the general government,³ and by provisions in almost all of the State constitutions, from taking private property for public use without compensation.⁴

Public necessity and compensation are indeed the vital principles of this right, commensurate and co-existent with each other; and there must be a conjunction of both to authorize its legitimate exercise; and although some authorities seem to sanction the principle that the right of eminent domain may be exercised independent of any provision for compensation, unless there is some other than the mere moral obligation operating upon the State,⁵ yet the better opinion and weight of authority undoubtedly is, that even where there are no constitutional restrictions to conditions of compensation, they are nevertheless as binding upon the State as though they were declared by her constitution.⁶ Indeed, viewing the matter in the light of obvious justice, it is strange that it should ever have been doubted, or that courts of *justice* should have promulgated a doctrine of such flagrant wrong—we had almost said iniquity. Its practical results would almost incline one to doubt the boasted unity of law and reason. The doctrine must have originated in despotic governments, and in the infancy of those of more liberal principles, has

¹ 4 Inst. 86.

³ 7 Peters, 248.

⁵ 3 Dall. 245; Ib. 288.

² 2 Dall. 310; 7 Pet. 248; 8 Wend. 85.

⁴ 14 Conn. 146; 8 Wend. 100.

⁶ 2 Kent, 339, n.; 1 Maryland Ch., 252.

been adopted into and become a part of their polity; but this, like other abuses of the law, founded in error and referred to as precedent, is now exploded, and it may be safely asserted that the universal principle acted upon by the courts of this country is, that compensation attaches to this right and is co-extensive with it, and that even where there is no constitutional restriction of the right to this condition, the principles of obvious justice would not permit the subject to be deprived of his property without securing to him a partial equivalent, for it must often happen that the possessions of an individual may have to him a value entirely beyond its current worth, as did the garden of Naboth, the "inheritance of his fathers."

We have been curious to trace the origin in our own courts of a so manifestly erroneous doctrine, for in those of England the principle neither has, nor we will venture to say never will appear, and we have found that the seizure of private property under such circumstances has been confined to that of but trivial value; and in the early establishment and declaration of the laws of such States as have not constitutionally declared the principle of compensation.

In the early settlement of South Carolina, while the whole country was as yet a wilderness, and roads and bridges were objects of the greatest importance and eagerly desired by the citizens of every part of the State, they were only too willing to have highways constructed over their lands to facilitate mutual intercourse: the materials too, which were commonly required for such purposes were abundant and comparatively worthless, and it so happened that no person ever required compensation, because every one was glad to have a road run through his particular lands.¹ It had thus so grown into a custom to require no compensation, that when the custom was resisted and compensation claimed, the courts seemed to have mistaken it for a true principle of law and to have strengthened it by their confirmation, creating precedents by which subsequent cases were decided.²

But even while the courts acknowledged the obligation of pre-

¹ 3 Hill South Car. 115.

² 1 Nott & M'Cord, 5, 387; 2 Ib. 526; 4 Ib. 125; 3 Hill South Car. 107; 4 M'Cord, 541.

cedent decisions, some of its members did not hesitate to question the soundness of the principle, and declared that if such were the rule of law in that State, it should be restricted to special cases, and that the legislature could not delegate, by a general law, its power of eminent domain, or taking property without compensation.¹

It could not, however, be expected that in an enlightened age, much as precedent might be deferred to, that a rule of such manifest injustice should continue to be recognized; the doctrine was accordingly violently questioned in a most elaborate and learned opinion by one of the justices of that State, the effect of which so awakened public consideration to the subject that the legislature by a subsequent general act required compensation for any property taken for public purposes. "A fine instance," say the court, "of the advancement of moral influences."

Such is a brief history of a most novel and extraordinary doctrine—one which is in its nature so inconsistent with our notions of republican principles, where the rights of all are equally secured, that it excites our surprise that it should ever have obtained judicial countenance in this country.

Property is most usually taken under special statutes, and our constitutions recognize the right of eminent domain on which these statutes are founded, but they intend to protect carefully individual property, and their language is generally, that private property shall not be taken for public use, without "*just* compensation."

The theory being that the individual from whom property is taken, is entitled to just compensation therefor, and this term being incorporated into most of our State Constitutions, in express terms, it becomes an interesting inquiry to ascertain what the phrase, "just compensation," may comprehend.

Acting upon the principle that a spirit of justice and equity required that an individual shall not receive a benefit without incurring a commensurate obligation to those from whom it is obtained, some courts have held that in the estimate of damages or compensation, whatever benefits have accrued to the owner of property in the enhancement of his remaining property by the disposition of a

¹ 8 Hill South Car. 109.

part of it to public purposes, such benefits should be made to offset the claim to compensation,¹ and it was ironically remarked by a certain judge that "it was a remarkable feature of such estimates, that the measure of the increased value of the enhanced property is the exact measure of the cost of the property taken."

But it has been replied that the constitutional obligation to make compensation, did not contemplate the equities of the transaction as regarded benefits, but regarded absolute compensation, and that when property of a particular value is taken from the owner, nothing but that value in money can satisfy constitutional obligations, for if he from whom part of his property is taken, is remunerated in part or in whole, so also is the property of others enhanced in value, perhaps as much or more than his own, and it would be unfair to require him to pay for an advantage towards which they contributed nothing.²

The latter seems to be the general rule, and we understand the term, just compensation to signify the dry claim to the value, in money, of the thing taken, at the time of the taking, irrespective of any speculative advantages or disadvantages whatever.³

Although the principle that when property is taken for the public use, compensation must be made, it is often a most difficult practical question to determine when there has been such a divestiture of property as demands compensation. The different degrees in which property may be affected, to the owner's disadvantage, and by means, more or less indirect, are almost infinite, and it becomes almost impossible to lay down any general rule applicable to the facts of every case; some have contended that the taking or appropriation measuring the compensation to be made, is to be confined only to the actual value of the property taken, and whatever might be the injury indirectly resulting to the owner from a disposal of it to the use of the public, that he has no claim to consequential injuries, unless some special provision is made in his favor, and the authori-

¹ 23 Vt. 361; 8 Watts. 295; 5 Blackf. 384; 8 Wend. 101; 9 Leigh, 325; 14 Ohio, 541; 16 Penn. S. R. 191.

² 2 Kent, 340, n.; 5 Dana, 28; 9 Geo. 364; 7 Dana, 86; 9 Dana, 114; 6 Barb. S. C. 216; S. C. 9 Barb. S. C. 535.

³ Sedgwick Meas. Dam. 566.

ties for this view of the question are formidable;¹ but the more equitable rule and the one certainly maintainable upon principle is, that consequential as well as direct injuries, should be included in the estimate, and that it must be left in a great measure to the integrity and sense of justice of those to whom is confided the consideration of the rights of both parties, in other words, to juries or commissioners.²

This rule will, we think, commend itself to the understanding of all. Legislative acts may be procured affecting and interfering more or less directly with vested rights: as for instance, one corporation may be chartered with powers that infringe privileges already conferred on a preceding corporation. If there is nothing in the charter of the first inhibiting legislative interference with its privileges in an indirect or consequential manner, it is clear the franchise of the first may be destroyed without compensation, for it is a legal *damnum absque injuria*;³ but if such provisions exist, or if the rights under the first be directly infringed, the amount of damages must correspond to, and be measured by the extent of the injury, either direct or consequential. Thus in the Charles River and Warren Bridge case, there were no expressed terms of exclusive limits, or stipulation not to charter a second company with powers to interfere with those of the first, and the court in effect, held this to be a loss without injury; but had exclusive limits been assigned, there would have been no question as to the measure of compensation being the value of the franchise possessed by the Charles River Bridge Company, at the time of its seizure.⁴ In every case, we think the principle may be maintained, that it is for the tribunal put in possession of the facts of each particular case, to determine the extent of the injury and corresponding damage; they must be the judges, and determine for themselves their own application of the maxim *causa proxima, non remota spectatur*. If a franchise or privilege may continue to exist, having been shorn of only an

¹ 1 Dall. 357; 7 Greenl. 278; 4 Dana, 154; 6 Whar. 25; 6 W. & S. 101; 8 W. & S. 85; 6 Penn. S. R. 379; 6 Barb. S. C. 209.

² 2 John. Ch. 162; 2 Kent, 840, n.; 11 Peters, 688; 4 Comst. 195.

³ 11 Peters, 420; Story, J., dissentient, 688; 21 Vermont, 590.

⁴ 6 Amer. Law Mag. 307; 3 Hill N. Y. 170.

incident of its being, or if there has been no substantial interference with its rights, but only a seizure of some part of its property, the loss of which will not essentially interfere with the purposes of its existence; for such loss it can only claim a money value, and will not be allowed to force attention to its so claimed impaired privileges when such privileges remain entire;¹ but if in giving effect to the legislative intention, the consequences of which a jury or those designated by the State to adjust the rights of the respective parties, shall determine to be a practical destruction of a previously conferred franchise, there can be no doubt of the obligation to make compensation to the extent of the full value of such franchise so seized.²

There are, indeed, many cases of this description where consequential damages are to be taken into consideration: as if the injury result from the creation of a new and rival franchise in a case required by public necessity.³

Much discussion also has arisen as to whether the compensation in these cases is to be made concurrently with taking property, or what results are to follow where a concurrent remedy is not provided in the act authorizing property to be taken.⁴

In regard to the constitutional provision securing trial by jury, it has been decided, in New York, that a legislative enactment for the ascertainment of damages by a committee is not unconstitutional.⁵ So in regard to the final decision of the County Court in Vermont.⁶

There have been very diverse views, as above stated, relative to the *time* when compensation must be made. In New York, it is well settled, that where an act authorizing the taking of private property for public uses provides for just compensation to the owner, it is sufficient that the act makes provision for future compensation.⁷

The assessment and payment of damages need not precede the entry and occupation. The rules, however, are different in different States.⁸ Chancellor Kent holds, however, that compensation, or

¹ 23 Pick. 391. ² 7 New Hamp. 35, 70; 8 *Id.* 398; 10 *Id.* 188; 11 *Id.* 19.

³ 1 Bald. C. C. 205; 11 Peters, 638; 2 John. Ch. 162; 2 Kent, 199.

⁴ Sedg. M. Dam. 556.

⁵ 3 Paige, 45.

⁶ 19 Vt. 479; 8 Humph. 476.

⁷ 7 Barb. S. C. 416; 1 Penn. 309.

⁸ 2 W. & S. 320; 3 How. Miss. 62.

offer of it, must precede or be concurrent with the seizure and entry upon private property under the authority of the State. The settled and fundamental interpretation of the constitutions of some of the States in relation to taking property upon compensation is, that government *has no right* to take private property without just compensation ; and it seems to be implied that the indemnity should, in cases which will admit of it, be previously and equitably ascertained, and ready for reception concurrently in point of time with the actual exercise of the right of eminent domain.¹

In England, by the Land Clauses Consolidation Act,² compensation is given for any lands, or "any interest therein, which shall have been taken for, or injuriously affected by the execution of the work ;" and under this statute, damage done by dirt and dust, and the obstruction of customers, is a subject of remuneration.³ Under this statute, also, the damages must be paid before entry.⁴ Where a dock company authorized to take lands, were to make compensation for the damages occasioned to any such land by the execution of the works, it was held that this language would induce compensation to a land-owner parting with his premises, for loss he would sustain by having to give up his business as a brewer, until he could obtain other suitable premises for carrying it on.⁵

In deficiency of any adjudication, the point as to how far persons are liable as trespassers who act under a statute authorizing the seizure of property to the public use, but which does not provide compensation, Chancellor Kent thinks the more reasonable and practicable construction to be that the statute would be *prima facie* good and binding, and sufficient to justify acts done under it, until a party was restrained by judicial process.⁶

The means by which the compensation for property taken is to be determined are, in England, either by a writ of *ad quod damnum*, or by commissioners appointed by the court for that purpose. The first is, perhaps, peculiar to grants from the crown, though such things as parliamentary writs of *ad quod damnum* are mentioned

¹ 2 Kent, 339, n. ; Code Napoleon, Art. 545.

² 15 Jur. 261.

³ 9 Q. B. 443.

⁴ 8 Vic. C. 18.

⁵ 1 Excheq. 723.

⁶ 2 Kent, 339, n.

in some of the books.¹ It is most usual, however, both in England and in this country, to appoint commissioners whose duty it is to determine the injury and assess the damages. Here, the State is bound to provide some tribunal for the assessment of compensation or indemnity, before which both parties may meet and discuss their claims on equal terms.² In some of the States the writ of *ad quod damnum* has been used, but it is more usual, as in England, to appoint special commissioners,³ whose duties are performed when they have examined the quality and value of the property taken, and filed their report.⁴

Having, at as much length as our limits will permit, stated the leading principles of law relative to compensation, we will now briefly consider that class of cases in which private property may be injured by, or taken for the use of the public, in a manner for which there is not, unless the common law has been amended by statute, any compensation allowed. They arise out of the urgent necessity of the occasion, and are unavoidable in their nature, and have obtained on the principle that it is better to suffer a private mischief than a public inconvenience; and this is the law of urgent necessity.

Of this principle there are many striking illustrations. If a road be out of repair, a passenger may lawfully go through a private enclosure.⁵ So, if a man is assaulted, he may fly through another's close.⁶ In time of war bulwarks may be built on private ground.⁷ Thus, also, every man may of common right justify the going of his servants or horses on the banks of navigable rivers for towing barges, &c., to whomsoever the right of soil belongs.⁸ The pursuit of foxes through another's ground is allowed, because the destruction of such animals is for the public good.⁹ And as the safety of

¹ 1 Burrows, 464.

² 2 John. Ch. 162; 5 Miller, 416; 1 Bald. 222.

³ 8 Dana, 298; 8 Paige, 76; 8 Wend. 102; 2 Jour. P. C. 521; 8 Hump. 476.

⁴ 1 Penn. S. R. 182.

⁵ 2 Black. Com. 86.

⁶ 5 Bac. Abr. 173.

⁷ Dyer, 8; Brook, Tresp. 213; 5 Bac. Abr. 175.

⁸ 1 Ld. Raymond, 725.

⁹ 2 Buls. 62; Cro. 1, 321.

the people is a law above all others, it is lawful to part affrayers in the house of another man.¹ Houses may be razed to prevent the spreading of a conflagration, and many other instances might be cited illustrative of the law of necessity.²

In the civil law the reason assigned why no compensation was allowed in cases of destruction by public enemies was, that every man might be made more diligently to guard his own.³

But, although by the common law there accrues no right of action to the party whose property is injured in the preservation of life or more valuable property, or in cases of injury to property from unavoidable necessity, yet in some of the States, by statute, as before suggested, the loss thus sustained for the good of the community is assessed upon those who have been most immediately benefited by the destruction. Thus, in cases of houses or buildings necessarily torn down, or otherwise destroyed, to prevent the spread of conflagration, it is allowed to assess the loss upon the city;⁴ but this does not extend to the case of property destroyed which would have been consumed had it not been so destroyed.⁵

There are also injuries so remote from the act committed, that the law will not allow actual compensation, presuming the injured party is compensated by sharing in the advantages arising from the original act,⁶ such as the police regulation of cities for the safety or health of its citizens: the principle being that all property is acquired and held under the tacit consideration that it shall not be so used as to injure the equal rights of others, or destroy or greatly impair the public rights and interests of the community; or, as the maxim expresses it, *sic utere tuo ut alienum non ledas*.⁷

So far, we have discussed the nature of the interest existing in the State, in virtue of the right of eminent domain; considered to

¹ 20 Vin. Abr. f. 407.

² Puff. b. 2, ch. 6, § 8; 1 Dall. 362.

³ Grot. B. 3, ch. 20, § 8; 20 Vin. Abr. f. 20.

⁴ 25 Wend. 174; 18 Wend. 126.

⁵ 2 Denio, 473; 8 Met. 462; 17 Wend. 295.

⁶ 13 Barb. S. C. 36; 4 T. R. 494; 2 T. R. 358; 8 Dana, 301.

⁷ Puff. b. 8, ch. 5, § 8; Willes, 388; Vattel, b. 1, ch. 20, § 246; 7 Cow. 585; 2 Kent, 339, n.

whom it belongs ; where it rests ; and the manner of its exertion ; observing the condition of compensation which has last engaged our attention.

We are now to consider the second indispensable condition, upon which only, can private right be made subservient to the interest of the public, and property be seized to its use ; and this, in the words of our definition of eminent domain, is

“ IN CASE OF NECESSITY AND FOR THE PUBLIC SAFETY.”

The sense in which Vattel here uses the word “necessity,” we have supposed to correspond to our idea of the ordinary requirements of a State, in the promotion of trade, commerce and improvements of various kinds, facilitating intercourse among its own citizens, and those of other nations, rather than those extraordinary occasions arising out of an overwhelming necessity, where the safety of an individual, a community, or a nation demand the sacrifice of private property.

We will consider, then, first, that class of cases which may be termed of *ordinary* necessity.

The necessities of the State as used in this sense, are of frequent occurrence, particularly in well-regulated and enterprising communities, where trade and commerce are in the most flourishing condition ; railroads, canals and highways of every description, are demanded to facilitate internal communication, private lands may be desirable for the health and recreation of the inhabitants of cities ; streets may be found too narrow and confined for public convenience ; in a thousand ways can the public be benefited by the assumption of private property, and in such cases it is in conformity with the most rational principles of natural justice that the interest of the individual should yield to the advantage of the many.

As the right rests with the sovereign, so must the sovereign wisdom be the only criterion by which the wants of the public can be measured : and the right is co-extensive with the public wants and

has no other limit ;¹ but as *necessity* is the essence of the claim upon which that right is to be asserted, if the delegated agents of the sovereign, be they legislative bodies or third persons, to whom such bodies have entrusted a special discretion, should in any manner interfere with the security of private property, under a pretext of public use or service, it would be an outrage and violation of private right which the courts of justice would not tolerate.² Neither upon full compensation does the right of eminent domain imply an authority to take the property of one citizen and transfer it to another, for the public interest would in no way be benefited or promoted by such transfer.³ If, however, the public interest can in any manner be encouraged or advanced, it must rest in the wisdom of the legislature to determine whether the proposed benefit to the public is of sufficient importance to warrant an equitable interference with the private rights of the individual.⁴ But it is said that it is not the lowest degree of public necessity which will justify the exercise of this right. As to precisely what the public welfare requires, it is often a matter of doubt and controversy among those equally wise in questions of State ; but the question once settled, we know of no limit to the right of eminent domain.

In practice, these matters should always be considered with reference to the wants of the public as being of greater or less importance, according to the nature of the property to be taken, as being of greater or less value.

The *extraordinary* necessities of a State, are those to which we have understood Vattel to refer, when he speaks of "public safety," and we shall be doing little more than repeating what we have before said when discussing the subject of compensation.

The necessities for the preservation of its very existence, which a State may be often placed under, give it naturally the very strongest claim to whatever may in the remotest manner be of service to it ; of this class is the right to enter upon the lands of the citizen for the purpose of erecting national defences, the seizing on property, money, or material of whatever kind which may be useful

¹ 7 W. L. J. 258.

² 2 Sandf. Sup. C. 98.

³ 3 Paige, 73.

⁴ 2 Kent, 339; Puff. b. 8, ch. 5.

in withstanding or expelling an enemy, the conscription of soldiers or the impressment of sailors. These cases of extreme necessity are, in their imperative nature, similar to that class in which only an individual may be the party to whom accrues the paramount right of unavoidable necessity; indeed, the right is the same whether it be employed for the benefit of an individual or a nation: inexorable necessity is its origin—its measure and limit—and this right must be equal to the exigencies of each particular case.

Having thus far, in the words of our definition of the right of eminent domain, found it to be "*A right which belongs to the society or the sovereign, of disposing, in case of necessity and for the public safety,*"—continuing the words of that definition, our author tells us that it embraces within its comprehensive claims,

"ALL THE WEALTH CONTAINED IN THE STATE."

It is unnecessary for us to say that this part of our definition needs no comment that it has not already received in the preceding pages; the difficulty in a practical application of the principles of eminent domain, lying, not in determining what wealth or property is subjected or exempted from the paramount claim of the State, but in a proper compliance with the legal restrictions and protections under which it may be appropriated to public use.¹

In taking leave of our subject, the investigation of which has given us a pleasure, while we hope it has not been without a measure of instruction, we cannot close without expressing our admiration for the singular aptness of its rules, for establishing the welfare of society, and promoting the happiness of the subject;—and how, in our own country, the development of its principles, directed by institutions novel in the history of nations, has only tended to confirm the wisdom in which they were conceived, and the caution with which they have been expounded. If the harmo-

¹ 7 West. L. J. 260; 9 Barb. Sup. C. 535; 3 Dall. 245.

nious movement of the British Constitution has justly elicited the admiration of the profoundest minds, at home and abroad, how much more should we, mature in their experience, devoutly desire the perpetuation of our own.

C.

THE EVIDENCE IN PALMER'S CASE.¹

1. *The Queen vs. William Palmer.* Official report of the minutes of evidence on the trial at the Central Criminal Court, May 14 to May 26, 1856. George Hebert, 88 Cheapside, London.
2. The "Times" report of the trial of William Palmer for the murder of John Parsons Cook, at Rugely. Ward & Lock, 159 Fleet street, 1856.

The trial of William Palmer, indicted for the willful murder of John Parsons Cook, demands some notice in our pages, for other reasons than the enormity of the offence perpetrated, or the extraordinary interest which it has produced throughout every grade of society.

It is difficult accurately to define what should make one trial more than another among the *causes célèbres*. Sometimes the high position or peculiar relationship of the parties concerned,—sometimes the barbarous cruelty employed, or the remarkable agents engaged to effect crime, or the marvelous mode in which detection has ensued, may give an unusual character to a prosecution; at others a romantic tone and conflicting doubts as to the verdict have left the impress of a real or false notoriety upon the proceedings in the Criminal Court. In later times, the trials of Thelwall, Rush, Greenacre, and Courvoisier, in England, of Burke in Scotland, of Kirwan in Ireland, of Madame Laffarge in France, of Webster in America, are all fresh in the memory, from some of the causes we have referred to; and the case of William Palmer, investigated at the Central Criminal Court from May 14th to May 26th, in the

¹ From the London Law Mag. p. 332, Aug. No. 1856.

present year, will also henceforth take its place along with them. But the trial of Palmer has other and considerable value to us and our legal readers besides that of its being either interesting or remarkable; and we draw attention to it here chiefly because it raises important questions connected with criminal jurisprudence.

Although our readers are probably not unacquainted with the leading facts of the case through the daily press, we will nevertheless briefly recapitulate them, before we draw attention to the points to which we propose more especially to confine our observations. This is rendered the more requisite from the lengthened duration of the trial, and the amount of evidence given thereon. The trial lasted for no less than twelve days, during which eighty-two witnesses were examined, forty of whom were of the medical profession or connected with its practice.

The case for the prosecution, then, which was founded on circumstantial evidence, and which we may divide into the general and medical, was this;—both Palmer the poisoner, and Cook the deceased, were on intimate terms, following the same pursuit, commonly called the “Turf,” which, whatever may once have been its character, appears, at the present day, to embrace an amount of low blackguardism and systematic swindling out of all proportion to the better qualities of sportsmanship which were wont to be attributed to it. In November, 1855, Palmer was in desperate difficulties; his liabilities appear to have amounted to about 20,000*l*. Writs had already been issued out against him, as well as against his mother, on account of bills of exchange. On some of the bills in question (purporting to represent a sum of 11,500*l*.) the name of Mrs. Palmer had been unlawfully placed, and it hardly admits of doubt that the forgery of her name had been committed by the prisoner himself. Ruin and exposure were thus impending over him, and he was endeavoring strenuously to stave off for a short time the demands of a creditor who held the bills. Now, it happened that on the 13th of November, Cook won a very considerable sum of money—between 1,000*l*. and 2,000*l*., in stakes and bets—on a race at Shrewsbury, and he had in his possession immediately after the races on that occasion upwards of 700*l*. in bank notes.

And here commences the horrible detail of a deliberate system of poisoning. Whilst in Palmer's company on the evening following the race, Cook, immediately upon swallowing some brandy-and-water, vomited violently, and declared that there was "something in it," and that it burnt his throat dreadfully, and that "Palmer had dosed him." He recovered from this attack of sickness, and both men left Shrewsbury for Rugely, and remained there in the society of each other during the next three days, Cook, however, still continuing to suffer from sickness, and Palmer for the most part superintending the administration of his food; but the evidence showed, that whenever nutriment happened not to come through Palmer's hands, vomiting did not supervene. Upon the *post-mortem* examination, antimony was found, and the prosecution suggested that the sickness resulted from its administration during the period we are now alluding to. We now come to the Monday (19th November) subsequent to the Shrewsbury races. Palmer left for London on the morning of the day (having previously given Cook some coffee, which made him sick, as before), and returned in the evening. He had employed the day in "settling" Cook's sporting debts in London, and appropriating them, as it appears, to his own purposes. In the evening Palmer re-appears at Rugely, and, according to the evidence of Charles Newton, obtained from the latter person three grains of strychnia; he is afterwards found in the bedroom of Mr. Cook, who had been better during the day. Pills had been prescribed for him by the medical attendants, to be taken in the evening.¹ At midnight, he is seized with frightful convulsions; his screams are heard by the inmates of the hotel. Palmer comes over from his house on the other side of the street to him, administers some medicine, and he recovers from the attack. The next morning Palmer purchases at another doctor's shop in Rugely six

¹ It will be observed that we do not follow the evidence of Mr. Jeremiah Smith, the solicitor, in this case. The reasons will be found in the summing up of Lord Campbell, who, amongst other things, said, of the respectable "professional man," "Can you believe his evidence when he acknowledges himself to have been engaged in such fraudulent transactions, and, being now examined upon oath, denies his own attestation to that document? Of his credit you are the judges," &c. &c.

grains of strychnia, two drams of prussic acid, and two drams of Battley's solution of opium. In the evening of this day Palmer administers two pills to Cook. Vomiting and convulsions ensue; and in the course of an hour or thereabouts Cook dies in frightful agony. A *post-mortem* examination is held at the instance of his father-in-law. The viscera are placed in jars, sent up to London; Palmer endeavors to bribe the post-boy to break them; but they are conveyed safely to London, submitted to the tests of Dr. Taylor and Dr. Rees. These gentlemen find, as already stated, antimony, but no strychnia. Palmer had been searching the dress and bed of the deceased, and when the money, supposed to have been in Cook's possession, and his betting-book, are sought for, they are not found, and no traces of either, as far as is known, have ever been heard of. We may pass over various other points of suspicion against the prisoner; the mysterious cutting of the bladder on the mouth of the jars—the attempts to tamper with the postmaster, and his communication with the coroner, as well as various other circumstances detailed on the trial.

We have merely offered an outline of the facts of the case, which, as seen from what we have said, is one of circumstantial evidence. The great difficulty of the prosecution lay in the proof of the *corpus delicti*, or, in other words, in showing that the deceased was *poisoned*, as alleged in the indictment. As it has been said by a learned writer on circumstantial evidence,¹ "In the proof of criminal homicide, the *true cause* of death must be clearly established; and the possibility of reasonably accounting for the event by self-inflicted violence, accident, or natural cause be excluded; and only when it has been irrefragably proved that no other hypothesis will explain all the conditions of the case, and account for all the facts, can it be safely and justly concluded that it has been caused by intentional injury; but in accordance with the principles which govern the proofs of every other element of the *corpus delicti*, it is not necessary that the cause of death should be verified by direct and

¹ Mr. Wills. See chap. vii. of his treatise "On the Proofs of the *Corpus Delicti* by Circumstantial Evidence.

positive evidence; it is sufficient if it be proved by circumstantial evidence which produces a moral conviction in the minds of the jury equivalent to that which is the result of positive and direct evidence."

That proof of the *corpus delicti* in cases of willful homicide may be established as well upon the grounds of presumption as by direct evidence, is clearly a legal necessity; otherwise the secrecy which attaches to assassination (rendering the crime all the more revolting) would afford certain protection to the worst offenders against society; and the skillful poisoner might, indeed, pursue his hideous art with perfect impunity.

In a recent number of the *Law Magazine*¹ we discussed the subject of "Presumptions in Criminal Cases," and we then took the opportunity of referring to the judgments in *Burdett's case* (4 B. & Ald. 121.) These are, however, so apposite to our present purpose, that we shall be excused in again drawing somewhat from the same source. "It has been said in the arguments in this case," observes Mr. Justice Best, "that there is to be no presumption in criminal cases. Nothing is so dangerous as stating general abstract principles. We are not to presume without proof; we are not to imagine guilt when there is no evidence to raise the presumption; but when one or more things are proved, from which our experience enables us to ascertain that another not proved, must have happened, we presume that it *did* happen, as well in criminal as in civil cases. Nor is it necessary that the fact not proved should be established by irrefragable inference. It is enough if its existence be highly probable, particularly if the opposite party has it in his power to rebut it by evidence, and yet offers none; for then we have something like an admission that the presumption is just." The learned judge appends, however, one valuable remark to the above; viz: that when presumption is attempted to be raised as to the *corpus delicti*, "it ought to be strong and cogent." In the same case another learned judge also (Mr. Justice Holroyd) pertinently remarked concerning these presumptions, that "they stand only as proofs of the

¹ London Law Magazine for Nov. 1855, No. cix. p. 374.

facts presumed till the contrary be proved, and then presumptions are either weaker or stronger, according as the party has, or is reasonably to be supposed to have it in his power to produce other evidence to rebut or to weaken them, in case the fact so presumed be not true, and according as he does, or does not produce such contrary evidence." We may remark, in passing, that this last observation applies closely to Palmer's case; for the fact of its lying in the prisoner's power to explain the possession and the use of the strychnia, and his *not* doing so, most material in enabling the jury to come to a verdict. Those who watched the proceedings day by day, anticipated, from the course which the trial was taking, that the employment of the six grains of strychnia (undoubtedly in the prisoner's possession at a critical time) would have been attempted to have been accounted for. It was continually being asked during the defence, "When is the poisoned dog to be produced?" or, "Where is the man who laid the bait for the vermin?" No attempt, however, to adduce such evidence was made.

To revert, however, to the mode of proving the *corpus delicti*, when the charge preferred is of murder by poisoning. It has, indeed, been contended by some authorities, that no charge of this kind should be considered as substantiated unless the poison shall have been discovered in the body; yet this is certainly not a rule of English law.¹ When such evidence is attainable, it is essential that it should be produced; when it is *not* attainable, other evidence is admissible for the purpose.

"In most criminal charges," says Mr. Wills, "the proof of the *corpus delicti* is separable from that which applies to the discrimination of the guilty individual; but it is not so in the cases of poisoning, where it is generally *impossible* to obtain conclusive evidence of the *corpus delicti*, irrespectively of the explanatory evidence of moral conduct and circumstances. It therefore almost of necessity happens, that there is a concurrence of all or most of these different kinds of evidence, and that the result depends not merely upon their separate force, but upon that additional force

¹ See this point discussed in Dr. Christison's *Treatise on Poisons*, 4th edit., pp. 68, *et seq.*

which is the consequence of their combination." So in the summing up of the evidence in Tawell's case, the able judge who presided expressed himself with his usual perspicacity on the subject. "In considering," said Mr. Baron Parke, "whether or not death was caused by prussic acid, the jury was not to abstain from *looking at the conduct of the prisoner as a part of that question*; they must look at *all the circumstances* of the case," and see whether the prisoner's conduct, and the fact that the poison was in his possession, "did not strengthen them in the conclusion that the scientific witnesses had properly arrived at the result, that beyond all doubt prussic acid was the cause of death." Scientific evidence, therefore, as has been laid down, must, in the class of cases now referred to, be taken in combination with other evidence adduced—the moral conduct of the accused, and the surrounding circumstances. Indeed, if we look to other great criminal trials, we shall find the same doctrine affirmed in practice. The case of John Donellan, tried before Mr. Justice Buller, at the Warwick assizes, in 1781, for poisoning Sir Theodosius Boughton with laurel-water, affords a notable instance of very slight evidence being given of the deceased having died by poison; the real strength of the evidence adduced, and that upon which the prisoner was convicted, being derived from other circumstances; such as the conduct of the prisoner, and other grounds of grave suspicion. On the best medical authority in this case, indeed,—that of John Hunter,—it was deposed that the symptoms exhibited by Sir Theodosius did *not* necessarily lead to the conclusion of the deceased having been poisoned at all. Whether the conviction there was, or would be now deemed satisfactory, it is not our purpose to inquire. We have cited it rather as an instance where direct evidence in poisoning cases has been dispensed with.

The mode of receiving and treating such evidence is of course one of the most important duties to be performed on criminal trials; and a judge in summing up has the office assigned to him of explaining and helping the jury to estimate its value and applicability. The summing up of Lord Campbell on Palmer's trial was not acquiesced in by the counsel for the defence; and the objection thereto is not undeserving of notice. At the close of the charge in

question, it will be remembered, the following discussion took place:¹—

Serjeant Shee:—"The question which your lordship has submitted to the jury is whether Cook's symptoms were consistent with death by strychnia."

Lord Campbell:—"That is not the question which I have submitted to the jury; it is *a* question. I have told them that unless they consider the symptoms consistent with death by strychnia, they ought to acquit the prisoner."

Serjeant Shee:—"It is my duty not to be deterred by any expression of displeasure; it is my duty to a much higher tribunal than your lordship's to submit what occurs to me to be the proper question. I submit to your lordship that the question whether Cook's symptoms are consistent with death by strychnia is a wrong question, unless it is followed by this: 'and inconsistent with death by other and natural causes;' and that the question should be whether the medical evidence establishes beyond all reasonable doubt the death of Cook by strychnia. It is my duty to submit this."

Mr. Baron Alderson here interposed with what sounds like a curious apology for an omission in the summing up of the Chief Justice. He exclaimed, "*It is done already—you have done it in your speech.*"

Lord Campbell thereupon proceeded to explain the part of the summing up complained of. He said:—"Gentlemen, I did not submit to you that the question upon which alone your verdict was to turn was whether the symptoms of Cook were those of strychnia; but I said that that was a most material question, and I desired you to consider it. I said that if you thought he died from natural disease—that he did not die from poisoning by strychnia—you should acquit the prisoner; but then I went on to say that if you were of opinion that the symptoms were consistent with death by strychnia, you should consider the other evidence given in the case, to see whether strychnia had been administered to him, and whether it

¹ See *Times* Report. The Official Report does not give the speeches or summing up.

had been administered by the prisoner at the bar. These are the questions that I again put to you. If you come to the conclusion that those symptoms were consistent with death from strychnia, do you believe that death actually resulted from the administration of strychnia, and that that strychnia was administered by the prisoner at the bar? Do not find a verdict of 'guilty' unless you believe that '*the*' strychnia was administered to the deceased by the prisoner at the bar."

Now, whether the form of putting the question proposed by Serjeant Shee would have been improper or no, there is no doubt but that the case for the prosecution was stated in that shape; viz. that the symptoms of the deceased were inconsistent with death by other and natural causes; and further, as we shall presently see, that the testimony of eminent medical men, called on behalf of the Crown, afforded the answer to the question, as Serjeant Shee submitted it should be put, but conclusively against the prisoner; for they affirm that the symptoms deposed to admitted only of the hypothesis that the deceased suffered from, and died in consequence of, swallowing strychnia. In connection with the mode of leaving to the jury evidence of the kind under discussion, we may cite the summing up of Mr. Baron Parke in the case of Tawell:

"This being a case of circumstantial evidence," said the learned baron, "I advise you, as I invariably advise juries, to act upon a rule that you are first to consider what facts are already distinctly and indisputably proved to your satisfaction; and you are to consider whether these facts are consistent with any other rational supposition than that the prisoner is guilty of the offence. The point for you to consider is whether, attending to the evidence, you can reconcile the circumstances adduced in evidence with any other supposition than that the prisoner has been guilty of the offence? If you cannot, it is your bounden duty to find him guilty; if you can, then you will give him the benefit of such a supposition. All that can be required is, not absolute positive proof, but such proof as convinces you that the crime has been made out."

In another part of the same charge the learned judge, in refer-

ence to the argument urged, that the deceased might have died from sudden emotion, remarked that it undoubtedly was within the range of possibility that a person might so die, without leaving any trace on the brain; but the jury were to determine if they could attribute death to that cause; if they found strong evidence of the presence of poison, and further, when the result of the evidence gave them the existence of a cause to which death might be rationally attributed, they were not to *suppose* it was to be attributed to any other.

These are cases easily to be conceived, in which—unless the jury were convinced that the symptoms attending a death were inconsistent with every other theory except that of death by a specific poison—a conviction would be most dangerous, but we cannot pursue this subject here any further.

The jury in Palmer's case asked no questions during the very prolonged sittings, and gave no overt sign, as we have heard, which could enable any one to prophesy how their minds were disposed with respect to the evidence; but we believe there was no necessity to have mistrusted its proper effect, had it been even left to them in the way suggested by the counsel for the defence.

We will now proceed to notice briefly the medical evidence against Palmer.

The medical evidence in question may be divided into two parts; first, that of chemists who have deposed to the nature and value of analytical tests for the purpose of discovering poisons; secondly, that with respect to the operation of poisons (especially strychnia) physiologically upon animal life.¹

¹ The following account of a paper on this subject, read at the late meeting of the British Association for the Advancement of Science, is taken from the *Athenæum* of August 22, 1856:—

“On several new Methods of detecting Strychnia and Brucia; a new Method of extracting the Alkaloids from Nux Vomica for Toxicological and Manufacturing Purposes. Experiments on Animals with Strychnia, and probable Reasons for Non-detection of Strychnia in certain Cases. A new Method of instituting Post-mortem Researches for Strychnia. By Mr. T. Horsley.

In the first lecture Mr. Horsley observed, that the circumstances attending Palmer's trial induced him to make a series of experiments on the subject, and he

Observations fell both from the bar and the bench on this trial which have drawn serious attention to the character of the medical

tried the effects of a precipitant formed of one part of bichromate of potash dissolved in fourteen parts of water, to which were afterwards added two parts in bulk of strong sulphuric acid. This being tried upon a solution of strychnine, the bulk was entirely precipitated in the form of a beautiful golden-colored and insoluble chromate. The experiment, as performed by Mr. Horsley, was very interesting, and scarcely a trace of bitterness was left in the filtered liquor. He did not claim to have originated this discovery of the use of a chromic salt and an acid liquor; but the point to which he called attention was the essential difference in the mode of application; and he maintained that it was as much out of the power of any human being to define the limit of sensibility which he had attained, as it would be to count the sands or to measure the drops of the ocean. Taking thirty drops of a solution of strychnia, containing half a grain, he diluted it with four drachms of water. He then dropped in six drops of a solution of bichromate of potash, when crystals immediately formed, and decomposition was complete. Splitting up the half grain of strychnia into millions of atoms of minute crystals, he said that each of these atoms, if they could be separated, would as effectually demonstrate the chemical characteristics of strychnia as though he had operated with a pound weight of the same. He then showed the chemical reaction with those crystals. Dropping a drop of liquor containing the chromate of strychnia into an evaporating dish, and shaking it together, he added a drop or two of strong sulphuric acid, and showed the effect, as previously noted. He next showed the discoloration produced in chromate of strychnia and chromate of brucia by sulphuric acid, the former being changed to a deep purple, and then to a violet and red. It had been asserted since the trial of Palmer, that the non-detection of strichnine in the body of John Parsons Cook was owing to the antimony taken by the deceased having somewhat interfered with the tests. Such a supposition was, in his (Mr. Horsley's) opinion, absurd. Nothing, he considered, could more incontestably disprove the fallacy than either of two new tests which he then performed. These he considered double tests, because they had first the obtainment of a peculiar crystalline compound of strychnine, which was afterwards made to develop the characteristic effects by which strychnine is recognized. Mr. Horsley next related a series of experiments which he had made on animals with strychnine, and entered into the probable reasons for its non-detection in certain cases, although (as he had just shown before) a method of detecting infinitesimal quantities of strychnia by tests. He procured three rats at seven o'clock P. M.; he (assisted by Dr. Wright) gave each rat a quarter of a grain of powdered strychnia, and two hours afterwards a quarter and half a grain more to one of the three. Next morning, at four o'clock, they were all alive, and had eaten food (bread and milk) in the night; but at seven, or a few minutes after, they were all dead. The longest liver was one of the rats that had only had a quarter of a grain. In about three hours afterwards he applied the usual test, but could not detect the least indication of strychnine in the precipitate. There was, moreover, a total

portion of the evidence. "I reverence the man," says the Attorney-General, "who from a sense of justice and an innate love of truth comes forward on behalf of any accused person who is in danger of being swept to destruction by the torrent of prejudice; but I have *no language to express my abhorrence for that traffic testimony which from professional pique, or for the sustentation of a particular theory, men of science—I grieve to say it—occasionally are led to offer.*" "Audacity" and "dishonesty" are also charged to the

absence of bitterness in all the liquor. He tried every part of the bodies of the rats with the like results. What, then, became of the strychnine? Had it been decomposed in the organism, and its nature changed, as Baron Liebig intimated? As to the non-detection of strychnine, he thought it not improbable that the strychnine might have become imbibed into the albumen or other solid matter, and so abstracted from the fluid, forming by coagulation (say, for instance, in the blood) a more or less insoluble albuminate. This idea had occurred to him from noticing the coagulation of the glairy white of egg with strychnine, and the fact of his not recovering the full quantity of the alkaloid whenever he had introduced it. At any rate, it merited consideration. In his second experiment he administered three-quarters of a grain of strychnia to a wild rat, but the animal evinced little of the effects of poison, and it was purposely killed after five days. His third experiment was with two grains of strychnia, administered as a pill, wrapped up in blotting-paper, to a dog—a full-sized terrier. It was apparently quite well for five hours, when the operator went to bed, but was found dead next morning, but lying apparently in the most natural position for a dog asleep. When taken up, blood flowed freely from its mouth. On opening the animal (continued Mr. Horsley) I found the right ventricle of the heart empty of blood, whilst the left was full, some of the blood being liquid, and some clotted. The stomach was carefully secured at both its orifices, and detached. On making an incision, I was surprised at not seeing the paper in which I had wrapped the pill, naturally expecting it would have been reduced to a pulp by the fluid of the stomach. I therefore sought for it, and lo! here it is, in precisely the same condition as when introduced into the gullet of the dog, and containing nearly all the strychnine. I have been afraid to disturb it until I had exhibited it to you, and now I will weigh the contents, and ascertain how much has been absorbed or dissolved. This experiment is important, as showing the small quantity of strychnia necessary to destroy life; and, had I not been thus particular to search for the paper envelope, it might possibly have led to a fallacy, as I must have used an acid, and that would have dissolved out the strychnia, and the inference would have been that it was obtained from the contents of the stomach, whereas it had never been diffused. In this case also none of the absorbed strychnia was detectable in the blood, or any part of the animal, although the greatest care was observed in making the experiments."

account of certain medical witnesses by the counsel for the prosecution, and in unmistakable language. Again, Lord Campbell, in his summing up, observed: "With regard to the medical witnesses called on the part of the prisoner, I must observe, that although there were among them gentlemen of high honor, consummate integrity, and profound scientific knowledge, who came here with a sincere wish to speak the truth, there were also gentlemen whose object was to procure an acquittal of the prisoner. It is, in my opinion, indispensable to the administration of justice that a witness should not be turned into an advocate, nor an advocate into a witness. You must say, gentlemen, whether some of those who were called for the prisoner belonged to the category I have described—that of a witness becoming an advocate You recollect the way in which Dr. Nunneley gave his evidence, and you must form your own opinion as to the weight to be attached to it. Certainly he seemed to display an interest not quite becoming a witness in a court of justice; but you will give every attention to the facts to which he refers, and to the evidence he gives." There were also other remarks made which it is needless to recall here, but which convey reflections on the medical evidence enough to demand from us some investigation into its real character. And let it be remembered, that if it should ever unfortunately become a well-recognized fact that there is a regular witness-market, whence may be procured scientific, professional, or technical evidence as it may be wanted, the most dire consequences must ensue. There will be placed in the hands of a powerful and malignant prosecution a frightful engine for cruel injustice; for, we may depend upon it, its use and application will not be confined to defences. And out of this evil, moreover, will grow another, viz., scepticism as to the real value of this species of evidence whenever it is produced; and that which ought to be of paramount importance in arriving at the truth, will be reduced to a useless parade of tainted testimony.

Let us take, in the first instance, the evidence adduced in the case before us with respect to the chemical experiments employed to discover the presence of strychnia. Dr. Alfred Swaine Taylor, of Guy's Hospital, was an important witness here; and he stated

that, on the examination of Cook's body, he found no prussic acid, opium, or strychnia: "With reference to the search for strychnia, the part which I had to operate upon was in the most unfavorable condition that could possibly be for finding that poison if it had been there;" and he proceeded to explain such condition. Dr. Rees confirmed this statement in almost the same language. Both of these scientific men further affirmed that "the poison is first absorbed into the blood, it is thus circulated through the body, and it especially acts on the spinal cord;" that is, the part of the body from which the nerves affecting the voluntary muscles, proceed. "I believe," says Dr. Rees, "that strychnia is absorbed before it produces its symptoms. If by accident or design enough strychnia is given to destroy life, *that might be the consequence, I believe, without my being able to discover it after death. I quite agree with Professor Taylor that it is the excess you find; that when vitality is destroyed by the excess of the poison, and an excess remains, you can discover that with care, sometimes.*" . . . "I saw the experiments which Dr. Taylor tried on four of the rabbits, not on the fifth. I assisted in the analysis made of the animals; we destroyed four animals, and failed to detect it in three." Dr. Taylor himself gave his opinion broadly on the question of discovering strychnia, and said that the statement, that if strychnia caused death, it would always be found in the body, *is untrue.*

It should be observed, however, that it was admitted by Dr. Rees that "we have no facts with reference to strychnia on which to found our judgment" as to its action as a poison by absorption; but Dr. Robert Christison confirmed the theory, and stated his opinion that when the quantity of strychnia is small, he would not expect to find it; but when there is an excess over the quantity necessary to destroy life by absorption, he would expect to find it, assuming that the excess is considerable. The ordinary tests upon the same authority are affirmed to be "uncertain in some respects." Dr. Christison added, with reference to the particular analysis which had been made in this case, that if he had been called upon to analyze such a stomach, he would have entertained no reasonable expectation of doing any good with it, unless a considerable quantity

of the poison had been present. This theory of "absorption" and "excess" is perhaps more clearly (though modestly) expounded by Mr. George Morley, a surgeon.¹ "Is it your theory," he is asked, "that in the act of poisoning, the poison is absorbed and ceases to exist as poison—as strychnia?" "I am inclined to think so. I have thought much on that question, but have not decided in my mind. I incline to think it is so. I believe a part undergoes a chemical change." On being pressed by the court upon the statement, he says, "I believe part may be absorbed unchanged, a part may undergo a chemical change, and a part may remain in the stomach unaltered." Dr. Taylor's version of the theory is substantially the same—"Strychnia is in a great part, too, changed in the blood; it undergoes a chemical change;" and he adds, "Supposing the minimum of the dose required to destroy life to be given, I do not think I should find any."

Now let us see what the chemists for the defence depose upon the same subject. Dr. Nunneley says, "I have experimented upon the bodies of animals poisoned by strychnia, with a view of discovering the strychnia poison in the body, the body being in various stages of fermentation and decomposition, from a few hours after death, at various periods up to the forty-third day, the body being quite putrid in the latter cases. I have not failed in any one case to discover the poison by the tests which I have applied." Again, he is asked, assuming Cook had died of strychnia, whether the poison *ought* to have been found by proper chemical analysis? and he replies that, "if death were produced by a minimum dose of strychnia, there would be no decomposition that could prevent the discovery of it;" "it would remain as strychnia in the system."

Next comes Mr. William Herapath, Professor of Chemistry and Toxicology at the Bristol Medical School, who says, "I am of opinion, as a chemist, that when strychnia has been taken in a sufficient dose, it ought to be detected by chemical science up to the time that the body is decomposed. I do not think putrefaction would decompose it completely. By decomposition, I mean when the body has become a dry powder." And again, "having heard

¹ Official Report, p. 101.

the evidence as to the jar which was conveyed to Dr. Taylor, I am of opinion that the jar containing the stomach, as is now stated, in the state it then was, *from my chemical knowledge, that strychnia ought to have been detected if it existed there!*" Some irregular attempt was made by the prosecution to show that this witness had formed and expressed an opinion that the poison had really been administered, but that Dr. Taylor could not find it; but the so-called "opinion" turned out to have been only expressed in conversation turning upon newspaper stories, and Mr. Herapath's evidence as to the conclusiveness of chemical tests was left as we have recounted it. Dr. Julian Edward Disbrowe Rogers affirmed to the same effect, and deposed, moreover, to the fact that he had found strychnia in the blood of a poisoned animal by color tests, and to his belief (assuming Cook had died of this poison) that he, the analyst, should be able to find it *now* in the tissues of the body. Dr. Letheby denies that when strychnia is absorbed into the blood the poison is changed, or that the coloring tests are fallacious, and says, that if the poison had been in the jars submitted to Dr. Taylor, he ought to have found it.

Dr. Francis Wrightson (introduced as a pupil of Liebig, and lauded by the court for the manner in which he gave his evidence) appeared also as witness for the defence, and thus deposed: "I have found no extraordinary difficulties in the detection of strychnia; in my opinion it is a poison to be detected by the usual tests. I have detected strychnia pure, and I have also discovered it when mixed with impurities, after separation from such impurities. I have detected it in mixtures of bile, bilious matter, and putrefying blood; . . . it can be detected in the tissues. . . . I have heard the theory propounded by Dr. Taylor as to the decomposition of strychnia by the act of poisoning. I am of opinion that *strychnia does not undergo* decomposition in the act of poisoning. If a man," continued Dr. Wrightson, referring to the case of Cook, which was put before him, "had *certainly* been poisoned by strychnia, I should *certainly* expect to find it." Dr. William Macdonald adhered to the same view also, and, moreover, stated, that to his knowledge no scientific man before Dr. Taylor

had ever propounded the theory that strychnia is decomposed on absorption, which he rejected altogether, as he did too the supposed fallaciousness of color tests. The contradictions here are manifest and great. High authorities affirm very positively that, by proper chemical tests, the fact of the strychnia having been administered ought to have been satisfactorily determined, while the distinguished analysts employed by the crown excuse their not finding the poison, first, from the facts of the difficulties which they allege surrounded the case; and, secondly, they explain their failure by a theory which it would seem is not sustainable, viz: that of the decomposition of the poison after it has been absorbed into the circulation. If the medical part of the evidence for the prosecution had merely rested on this testimony, the jury could not, we think, have come to the conclusion that the unfortunate man Cook had been poisoned by strychnia; for, assuming Drs. Taylor and Rees to have been the skillful analysts which they are represented to be, there would have been good ground, considering all the evidence adduced, to have inferred that probably strychnia was *not found* in the body, because it *was not* there. There remains, however, the second division of the medical evidence to which we have referred, viz: that which related to the symptoms preceding the death of the unfortunate person Cook.

Many were the witnesses who were called to give evidence as to the symptoms displayed by animals generally poisoned with strychnia, and as to the nature of its operation on human life. On the part of the prosecution appeared Mr. Thomas Blizard Curling (of the London Hospital), Dr. Todd (of the King's College Hospital), Sir Benjamin Brodie, Dr. Solly, and several other practitioners, who either were supposed to have great general knowledge on the subject, or who had had in their practice particular experience in cases of poisoning by strychnia.

The proposition of the counsel was, that Cook had died of *tetanus*, produced by strychnia. It was therefore essential to show how the symptoms in his case were distinguishable from traumatic tetanus—that caused by wounds or idiopathic tetanus, which, as not arising from external injury, we may popularly call constitutional. The

symptoms upon which the medical witnesses had to form their opinion were principally those deposed to by the local practitioner, Mr. W. H. Jones (who was present with the deceased when he died), and by the chambermaid, Elizabeth Mills, and they all gave their deliberate opinion that the symptoms described were not consistent with any form of traumatic or idiopathic tetanus. "Perhaps I had better say at once," says Sir Benjamin Brodie,¹ "that I never saw a case in which the symptoms that I heard described arose *from any disease*. When I say that, of course I refer, not to particular symptoms, but to the general course which the symptoms took."

Again, as opposed to the above evidence, we will take that of Dr. Letheby, who says, "I have heard certain symptoms described as attending the death of Mr. Cook. I have witnessed many cases of death from poisoning by strychnia—many of the lower animals; and several cases of poisoning by *nux vomica* in the human subject, one of which was fatal. The symptoms that have attended the cases of the animals that I have seen, *do not accord* with the symptoms described in this case;" and he then mentions the distinctions of the symptoms; such as the interval of time between the poison being administered and the convulsions supervening, the state of the heart, &c.; and he avers that "Mr. Cook's death is irreconcilable with everything I am acquainted with." So Mr. Partridge "could form no positive judgment as to the cause of death," but thought it was most important in a case of death from convulsion to examine the spinal cord shortly after death; and he further held that the symptoms described, were in several points, inconsistent with death by strychnia. Again, Mr. John Gay, of the Royal College of Surgeons, affirmed that "in the event of a given set of symptoms—tetanic symptoms—being proposed, it would be extremely difficult, if not impossible, without some other evidence, or collateral evidence, to assign it to any given disease or cause." "The cause of death," says a Dr. William Macdonald, "was epileptic convulsions, with tetanic complications." Other witnesses also were called to support the theory

that epilepsy might have been the cause of Cook's death; and one learned person proposed the explanation of *angina pectoris*. "Looking at this case, with the interval occurring between the two fits, I should, speaking scientifically, certainly say that the person suffering under them was more likely to be laboring under *angina pectoris* than strychnia."¹

The above account of the conflict of medical evidence is calculated to suggest painful ideas. Either the subject is very obscure, and these scientific witnesses have rashly dogmatized where they should have been modestly silent; or, while the facts of the case were such as to warrant certain obvious conclusions, others were promulgated in fraud of justice, and in contempt of truth. In "running-down cases," when the pot-house friends of the cabman combine to make his story good, and the uneducated companions of the van-proprietor conspire to support *his* version of an accident; or in gross election disputes, we expect, and assuredly find, perjury of all degrees and shades, from that of the strong partisan, who first persuades himself of an untruth, more or less firmly, and then steps forward to depose to it more or less stoutly, to the hardy miscreant who believes something or *nothing*, as the case may be, but who will swear *anything*, and "come up to the mark," for the proper consideration. But we hope we are not driven to infer from Palmer's case, as some do not hesitate to say we must, that, under the shelter of professional technical knowledge (which can be less easily tried by the tests of ordinary knowledge,) a body of so-called scientific men may be procured to violate truth, and dishonor the name of science.

We have not, be it observed, pursued in detail the cross-examination, or described the demeanor of certain witnesses in the case before us, which, however, while it showed the value which belonged to their evidence, has exposed them justly to severe animadversions.

¹ It has been stated, but we do not know whether upon good authority, that one medical man was importunate to be called to give evidence that the symptoms exhibited by Mr. Cook could have been those of *hydrophobia* only. This *angina pectoris* theory took the Attorney-General by surprise; and though, as we believe, not entitled to attention, it remained unshaken by any cross-examination.

We do not care to single out individuals to illustrate our position. To such of them as asseverated that the facts of the case were inconsistent with death by strychnia, and consistent with the various other causes which were assigned, it is enough now to say that neither the jury believed them, nor, we may add, the judges, nor any other competent persons who had an opportunity of forming an opinion. Well might the prisoner in the dock send down a note to his attorney, during the examination of one of his 'medical witnesses, to the effect that "this muff is doing more harm than good." If we are rightly informed, there were many more "muffs," or worse, proffering vain and ambiguous testimony, but whose offers, fortunately, were not accepted. The witness-box seems to be sought by some as a cheap advertisement, by others as the means of contradicting or discomfiting a rival; but from whatever cause it may arise, the worse danger to the administration of justice, and the greatest injury of the scientific character, will be incurred whenever it shall be known that professional witnesses may be *retained* to establish indifferently a case for either side. This is no fanciful danger; for we believe that there are few lawyers of considerable practice who could not within their experience give instances of the profligacy with which scientific testimony is tendered, and not in criminal cases only.

Far be it from us to characterize any profession, much less the medical, as generally untrustworthy or dishonest. Amongst its members are some of the brightest ornaments of society. It would, indeed, be the height of absurdity to condemn medical men as a class, or to accuse them of habitually violating one of their highest duties—that of deposing truly to facts within their observation, when called on so to do in courts of justice; but that there have been frequent occasions when, to use Lord Campbell's expression, the medical witness is turned into the retained advocate,¹ is as true

¹ Lord Campbell's antithesis really signifies this—that the witnesses he describes, under the pretext of swearing to a *fact*, depose to the consequence of an argument, whether it convince them or no, and independent of their belief in the truth of the premises or the accuracy of the reasoning, and the conclusions which they affirm. *Counsel* are bound to present arguments (whether convincing to themselves or no,)

as it is grievous, and when such occasions occur they call for most unrelenting comment. We dismiss now any further observation on this head.

As we have been led to make these remarks on professional morality, it is not altogether out of place to refer to the reflections which have been cast upon the bar,¹ with regard more especially to Palmer's trial. There are some popular portions of the press which habitually delight in attacking the conduct of counsel. A writer in a newspaper, for instance, picks out what he thinks, or supposes he may lead others to think, by "smart" writing, to be an error in the counsel in conducting his case; forthwith he slips on the snow-white garment of the rigid moralist, and pens a virtuous and indignant article. Thus our moral contributor, sitting up in his apartments in a London street, tries a capital case some three hundred miles off, which the law has however confided to the care of twelve weak jurymen, one imbecile judge, and perhaps four or five corrupt barristers, of large experience in criminal cases; and if the verdict is opposed to that of the self-constituted arbiter, and if the learned counsel for the defence cross-examine effectively, and speak eloquently, he is forthwith denounced by the upright author of pungent articles, and his name is righteously exposed to obloquy! Generally speaking, the spiteful paragraphs we are alluding to, although pointed at individuals, in order to give them the better zest, are really attacks, but ignorantly made, upon the principle of advocacy itself. They mean this (and apply equally to civil as criminal cases)—that inasmuch as it is assumed that one party to a suit or prosecution must always be in the wrong and the other in the right, the counsel who appears for him who has the law against him, is a conspirator with his client, who has injured his neighbor and refuses to atone for it. Now, it is too late in the day

and the Court decides on their soundness;—*witnesses* are bound to affirm their belief or their knowledge—the truth, the whole truth, and nothing but the truth, as they are convinced of it.

¹ We do not here refer to a contemptible and very stupid pamphlet, which is supposed to have been concocted by a disreputable person connected with the legal profession.

to argue about the morality of the advocate's profession. If any one really thinks it unconscientious for a lawyer to hold a brief until he has tried the case himself, and determined on the rectitude of his client, we will not quarrel with this opinion. We should, however, commend to his notice the conversation on this matter, now known to readers of books these sixty years, which was held between the poor, doubting Boswell and Dr. Johnson: "But do not you think, sir, that it is wrong to defend a person you know to be guilty?" asks the pure Boswell. "You do *not know* it, sir," answers the moralist; and in his own great way he explains the theory to his worthy biographer, as most of our readers must well remember.

In fact, no counsel appears for a prisoner who does not, by the very act of his standing up in his defence, protest the innocence of his client until the contrary be proved. He is to discredit the material statements preferred against his client, dispute the arguments adduced, dislocate the links of evidence presented, and insist with all his might and main upon the truth of his client's plea—"not guilty." He is not to admit into his own mind, and must exclude from the minds of others, any idea but the innocence of the man whose interests he is to protect, or he will place his client in a worse position than the law has placed him in. As Lord Campbell observed, the protests of a prisoner's counsel (who in uttering them is precluded from drawing the distinction between his professional and personal character) are in fact but equivalent to the plea of "not guilty." The common form employed by the advocate, who says to the jury, "After having heard the evidence, you will be able to come to no other conclusion but that of the innocence," or "the guilt of the prisoner," necessarily involves the notion that the effect of the evidence on the mind of the advocate himself is in harmony with that he imputes to the jury. The particular language, however, used on this occasion, afforded a convenient peg whereon to hang abuse of the legal profession, and a personal attack upon the eminent advocate who was concerned for the prisoner; and the opportunity was of course seized with vicious avidity.

The convict, as we have heard, went to the scaffold, denying that

he killed Cook by strychnia. Whether this was a subterfuge whereby the wretched man deceived himself into the belief that he was not positively stating a lie, it is useless to inquire; but probably he was right. It was *not pure strychnia* by which Cook was poisoned. The drugs ordinarily used by chemists and apothecaries are disgracefully adulterated; nay, it is notorious that one kind is often substituted for another. Now one grain of pure strychnia is a death-dose. The first purchase by Palmer of the poison of Newton¹ was *three* grains. Whatever amount may have been administered, it produced frightful convulsions, but did not prove fatal. The second purchase was *six* grains, and death ensued. Brucia (an extract of the *nux vomica*, as well as strychnia) is stated by Dr. Taylor to be often mixed with, and substituted for, strychnia, and is of one-sixth to one-twelfth of its strength; and he says, "unless you are sure of the purity of the article sold to you, you may be misled as to its strength." Now if three grains of the article first procured were impure, the failure in its effecting death is explained; but the *six* grains also of the impure drug, bought on the second occasion, might probably be just the quantity which would prove fatal. We have not heard, however, that the prosecution took the pains to test the qualities of the poison in the strychnia-bottles at Rugely, although it seems to us that it would have been a very proper course to pursue. And we may, *en passant*, observe, that experiments which *since* the trial have been made touching the effect which antimony in combination with strychnia has upon the discovery of the latter in a *post-mortem* examination, might well have been made *before* the trial.² Possibly, also, an investigation into this (as, indeed, is affirmed upon some authority) might have prevented the exceptional theory of decomposition of the poison in the blood being promulgated in court, by furnishing another sufficient explanation of the failure of the chemical examination.

¹ It has been said, on good authority, that the man has admitted that he sold it in the form of *pills*: at the trial he stated it was in the form of powder.

² The theory of the Attorney-General that Cook was *prepared* by antimony for strychnia seems very unnecessary. The evidence shows an intention to kill Cook by antimony, which was too slow in its operation, and strychnia was consequently resorted to.

We have just noticed that Palmer is said to have died without a confession of his guilt. To our minds this is of no value, so far as regards the propriety of the verdict and justice of the sentence. According to some continental systems, the confession of a prisoner must be extorted before he suffers the extreme penalty of the law. With us, although an admission of guilt may occasionally satisfy the scepticism of some people, and as proving penitence may be a relief to the minds of others, yet non-confession, as the annals of crime demonstrate, affords no ground whatever for inferring innocence. Physical temperament, strength of nerve, habitual hardihood, indifference to this life, and an inability to conceive of another (the prominent cause of this recklessness of the type of the immoral and brutal man) nay, even the desire of revenge, which, we know, is stronger with some men than the fear of death itself, may each be ample cause to induce a criminal to persist in his lies, though standing on the threshold of his doom. So, too, the demeanor of a prisoner during his trial is no test of innocence.

The "coolness," as it was called, of Palmer during his trial, was no doubt very great. Thus we are informed that whilst the evidence was accumulating against him in fearful masses, he leaned over the dock to learn who was "the winner of the Manchester cup." Thurtell went, however, further than this. A few hours before his execution he remarked, "It is *perhaps* wrong in my situation, but I own I should like to read Pierce Egan's account of the great fight yesterday," referring to the prize fight between two great heroes of the ring,—Spring and Langan. Tawell, too, another hard-souled villain, affords an example where confession was not resorted to by the convict to relieve his own mind, but made in indifference. Upon being pressed for it, this wretched man alleged that as he had promised it, he would perform his promise. Whether the confession in this case was true or not has never indeed been tested; for though the extraordinary version he gave of the murder has leaked out, it is not known upon any authenticity which we can cite. "It is true," says Sir Fitzroy Kelly, in a recent letter to Mr. Herapath relating to Tawell's trial, "that he confessed; but I have the best reason to believe his confession was that he committed the murder

indeed, but in a manner totally inconsistent with the truth of the scientific evidence upon which he had been convicted." Sir Fitzroy assumes the truth of the supposed statement of Tawell, which is more than we would do without sufficient corroboration; for the letter continues, "If this be so, it affords a remarkable proof of the caution with which all evidence of this character should be received."

There is also another point with respect to confessions, which should not be forgotten; viz.. the mental reservation which is not unfrequently practiced by a criminal. A part of the fact is truly narrated, upon the strength of which credit is taken to distort or deny others, whether material or immaterial. Thus, one of the horrid arsenic poisoners, Schonleben, whose long-continued iniquities are elaborately detailed by Feuerbach, *did* acknowledge that she had placed arsenic in a salt-box, but persisted to the last that she had not mixed any in the salt-barrel; although there could be no possible doubt of this fact, as well as of the former. An experienced authority, Colonel Chesterton,¹ in a recent work, has some remarks upon the subject of the confessions of criminals, so pertinent, that we shall borrow them. He says:—"There was something perfectly ridiculous in the all but universal claim to innocence on the part of convicts of all degrees. If ever an individual were found sufficiently candid to avow his fault, the rare exception would arise amongst those of superior education. But even in such a case, this would be intermingled with so much qualification, that the plea of justificatory circumstances would greatly detract from the honesty of the confession." Does any one doubt of the guilt of the demoniacal Rush, or of many others who died in sullen silence or vehement protest of innocence?²

¹ Revelations of Prison Life. 1856.

² There is one solemn protest of innocence, however, that of Elizabeth Fenning, tried in 1815, for attempting to poison the Turner family in Chancery Lane, which we think to have been true. The evidence offered was the best example of imperfect and inconclusive circumstantial evidence which the lawyer can find reported. In addition to which, the person who had mixed the arsenic in the food, admitted the crime when on the point of death. Such a terrible miscarriage of justice could hardly nowadays be permitted to occur. Sir Samuel Romilly has recorded his impression of this case in his Memoirs.

Recent criminal trials have brought before the public mind two points (amongst others) of great importance; the one is the facility which medical knowledge offers to the crime of poisoning; the other, the temptation which life insurance presents to the embarrassed and unscrupulous. Tawell was a chemist, Palmer a medical man; and other cases will also occur to the recollection of the reader, which for obvious reasons we do not here more particularly specify. The evil first referred to is one belonging to the nature of things, and we can suggest no practical safeguard. But with respect to insurances, it is a subject for consideration—seeing it was found needful to meet the evil of burial-clubs among the lower classes—whether that of speculation on life amongst the higher, apart from commensurate interest, does not call for some legislative interposition. Insurance companies are now heard declaring they are continually defrauded, and even point to murder as a means employed to rob them. Do they use ordinary caution for self-protection? Is it not notorious, for instance, that within a very short period one case has come to light where an unfortunate man, in impoverished circumstances, and with a certainty of speedy death before him, trafficked on his own life—effecting policies within one year to the amount of *many thousand pounds*, and disposed of them to wealthier speculators, who bought them of him immediately at a premium? Do insurance offices examine the facts of the case fairly *before* they grant policies? or, in the struggle to do business, are they reckless or indifferent? and do they not thus connive at the iniquity which they afterwards are ready to plead as an excuse for non-payment? We will not enter upon the subject more at large; but it is one which calls at least for serious consideration. No doubt unnecessary legislative interference with contracts is to be deprecated; but the question is *what is* needful.

That Palmer was a speculator on lives, no one can doubt; and how he could have made any profit by insuring for 25,000*l.* the life of the stableman George Bates, “Esq.,” except upon the supposition that he was to be disposed of, we own we are at a loss to conjecture. Palmer, during the year 1855, had insured his own brother’s life for 18,000*l.*, and had made proposals to different other

offices for about six times this amount. The life dropped within twelve months. So, too, the wife of Palmer died after the payment of the first premium on a large insurance effected by the husband. It is impossible almost to avoid the horrible suspicion that the verdicts of the coroner's juries on these two cases are well founded, and that both were the victims of a murderer, for the sake of the insurances; and further, that he had in contemplation the death of Bates. Wainwright's atrocities years back, too, are not forgotten; and there are certain directors of insurance offices who could unfold tales of no imaginary horrors, which have of late incidentally come to their knowledge, though they have never been, nor will now be, brought to light. Such facts as these at least suggest to our minds that there is a stringent need for insurance offices to mend their ways themselves, if they do not wish to have them mended by the law.

RECENT AMERICAN DECISIONS.

Louisville Chancery Court, Kentucky, August, 1856.

FRAUDULENT CONVEYANCE AND ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

HOOPER, SON & CO. vs. ROSENTHAL, ETC.

1. Whether a debtor who has made a fraudulent conveyance can afterwards assign the property so conveyed, to be applied to the payment of his debts, or not?
2. Is there any difference between the conveyance of such property to others in trust for the payment of debts, and a conveyance directly to the creditors themselves?
3. A conveyance of property of every kind whatsoever in trust for the payment of debts will include property previously conveyed to defraud creditors, unless it is held adversely by the fraudulent vendee.
4. The British doctrine with regard to assignments for the benefit of creditors, and the American doctrine.
5. The opinion of Chancellor Kent, in *Bayard vs. Hoffman*, 4 Johns. Ch., 450, adhered to, notwithstanding subsequent decisions.

PITTLE, Chancellor.—Rosenthal made a deed of assignment to Mendell in trust for the payment of his debts, in which certain preferences were made among his creditors. The plaintiffs were

not satisfied with the deed, and attacked it as fraudulent; but it was sustained by the court. Judgment, however, was rendered against Rosenthal for the debt of the plaintiffs, and they sued an execution thereon, and levied it upon a slave which had been conveyed by Rosenthal to Kremer before the deed of assignment was made. This conveyance to Kremer, they say was fraudulent, made to cheat creditors, and the slave is liable to the execution. The deed of assignment, after mentioning many specific articles of property conveyed by it, declares that it includes all the property of the said Rosenthal, "of every description, name and nature whatsoever." The slave was a very short time in possession of Kremer, and was in possession of Rosenthal at the date of the deed of assignment.

The question for the court to decide, so that the jury may have the matter before them, is whether the deed of assignment would include the slave, and so she would not be liable to the plaintiff's execution, if the sale to Kremer was a mere sham, and made to defraud creditors.

It has been often stated that, as the party who has made a fraudulent deed cannot allege his own fraud, he has no power to dispose of the property conveyed by such deed by a new conveyance, on his own mere motion; that a purchaser for valuable consideration may hold against such deed, but those who come under a conveyance merely at the instance of the fraudulent vendor cannot gainsay his deed any more than he could himself. And this is true generally. But can the creditors in this instance come under the rule that places the grantee in the same position as the grantor? They are not volunteers in the sense in which that word is generally applied. They stand in a meritorious condition. The payment of just debts is as proper a duty as any other; and where a deed conveys property for this purpose, it cannot, in any propriety of language, be called a merely voluntary deed, without consideration, and which is to be esteemed no better in court than a previous deed that was made to defraud these creditors. The previous deed, the law says, is void, as to the creditors; but public policy will not allow the vendor to say so, as between him and the vendee. He

cannot reclaim the property for himself; it is right he should be so punished for having committed the fraud. But if he should convey the property, for a valuable consideration, to a purchaser who bargains with him, this purchaser can hold, because of the valuable consideration. Now, why may not the creditors have the property devoted to the payment of their debts by this deed? They claim for a valuable consideration. The sale was unreal; it was void, as far as their debts were concerned. It was so far void, as to leave the property in the vendor, to be conveyed to the purchaser for value, because he would stand in a meritorious position. Do not these creditors, against whose debts the sale was void, stand in as meritorious a position? Is it not better that property generally, which has been fraudulently sold, should still be so devoted in the hands of the assignee, than that the title should be in the fraudulent vendee, and the property left subject to be used and worn out, or destroyed, or to be sold by him, as it might be, to a *bona fide* purchaser, and thus be put out of the reach of creditors altogether? To say that the fraudulent grantor, whose deed is void as to creditors and purchasers, cannot convey for the benefit of creditors, seems to me to yield to a notion unprofitable in practice, and merely artificial.

If the conveyance were immediately to the creditors, in consideration of their debts, it would be difficult to say they could not hold. The statute does not say the fraudulent conveyance shall be held void *in an action* brought by creditors; but that it shall be void as to them. If they could not hold under a deed from the fraudulent grantor, then this absurdity would appear: that a stranger might buy for valuable consideration, whether he knew of the fraudulent deed or not, but a creditor, in consideration of his debt, meant to be protected by the statute, could not buy, even if he did not know of such deed.

There is no difference in America, as to the rights of the creditors, whether the deed of assignment is made to the creditors directly, or made to assignees, for their benefit, when they are not parties to the deed. The title passes in each case for their benefit, and they are not deemed volunteers, but will be aided in equity, as

others who claim its aid for valuable consideration. This is the constant practice. I need not cite more cases, than *Bayley vs. Greenleaf*, 7 Wheat. 46; *Marbury vs. Brooks*, 7 Wheat. 556; *Brooks vs. Marbury*, 11 Wheat. 78; *Ingram vs. Kirkpatrick*, 6 Iredell's Eq. Rep. 463. This is so well established in Kentucky, that authority need not be cited from our courts. See Burrill on Assignments, chap. 26.

In England, where the creditors are not parties to the deed of assignment, it is looked upon as a deed of *agency* merely, for the benefit of the debtor, in having his effects applied to the payment of his honest debts, and the Court of Chancery will not generally carry out, or recognize, a trust for the creditors, but will, at any rate, permit the grantor to change or revoke the disposition made of the property, where creditors will not be in any worse condition by anything done by themselves or their agents in reliance on the deed. But in that country, where the creditors are parties to the deed, the trust arises as it does here, and the deed is not deemed voluntary. See *Mackinnon vs. Stuart*, 20 Law J. (N. S.) Chanc., cited in Burrill on Assignments, 216.

I think that creditors claiming under the deed of assignment, whether made to trustees or to themselves, would be treated as volunteers, in some instances. A mistake made between their grantor and a previous party, or a fraud practiced on the previous party, would be corrected as to them in some cases, when it would not be as to a purchaser who had paid a new consideration. Other equities, such as the lien of a previous vendor, which did not appear of record, or of which no notice was had, would not be protected, as was decided in the case of *Bayley vs. Greenleaf*, in the Supreme Court of United States, before cited. The case of *Twelve vs. Williams*, 3 Wheat. 492, is otherwise, and holds the creditors to be mere volunteers; the case in 7 Watts & Serg. 372, is to the same effect. The cases of *Brownell vs. Curtis*, 10 Baige, 210, is also to the same amount, and goes on to say, "It is a general rule of law, that a person cannot, by any voluntary act of his own, transfer to another a right which he does not himself possess." "And when an insolvent debtor has made a fraudulent transfer of

his property, or has discharged his own debtor from his liability, for the purpose of defrauding his creditors, so that he cannot reclaim the property, or sustain a suit for the debt in his own name, he cannot by an assignment, which is wholly voluntary on his part, take away the right of his creditors generally to set aside the fraudulent transfer, or recover the debt fraudulently discharged, and transfer that right to his own assignee for the benefit of his creditors."

The same doctrine is substantially laid down in *Browning vs. Hart*, 6 Barbour's S. C. 91; and *Leach vs. Kelsey*, 7 Barb. S. C. 468.

This is plausible, because, at first sight, it indicates equality between the creditors in respect to the property fraudulently conveyed. But it is not so. The attaching or levying creditor would take all.

If the fraudulent grantor could convey to others, it is not sufficient reason for saying he shall not have the power to convey to his creditors, whom he had thought of defrauding, because he may then prefer one to another. This results, if a statute does not say he shall convey, if at all, to all *pro rata*. Is it not proper that he should have this *locus pœnetentiæ*, and be permitted to retrieve the wrong he had intended his just creditors? If it is right that the property should be distributed equally among all the creditors; yet the doctrine, as laid down in the cases cited, would not permit this, because it rests upon the ground that he has no power to convey, on his own motion, what he has already granted by a void sale. This is the whole reason, at last, for the doctrine.

Chancellor Kent, in the case of *Bayard vs. Hoffman*, 4 Johns. Ch. 450, held that stocks, which had been previously conveyed in voluntary settlement by a debtor, did pass to his assignees, for the benefit of his creditors, by general words, broad enough to include the stocks, if they had been in his own hands. This case Chancellor Walworth thought (10 Paige, 210) was not well considered; but from the character of the counsel engaged, and the general habit of Chancellor Kent, I think it must have been well considered. It may have escaped me; but I do not now recollect any English de-

cision against this doctrine of Kent ; I mean on the property passing to the creditors. The Court of Appeals of Kentucky approve the doctrine stated in the case of *Bayard vs. Hoffman*, in regard to the effect of the general words, without any further inquiry as to the intention of the grantor. See *Lexington Life, Fire and Marine Ins. Co. vs. Page & Richardson*, 23 Jan. 1856 ; not yet published.

There might, indeed, be cases in which the general words, or any other words, would not include the property fraudulently conveyed. As, for instance, where the property is really at the time in adverse, unfriendly possession, as it might be so held by the fraudulent vendee ; for, according to repeated decisions of the Court of Appeals in this State, personal property held adversely cannot be conveyed by the owner, as it is reduced to a chose in action. 1 Lit. 298, *Young vs. Ferguson* ; 2 B. Mon. 156, *Waggener vs. Hardin* ; 4 B. Mon. 462, *Hewitt, &c. vs. Studevant, &c.* The contrary doctrine was strongly stated by Judge Story, 2 Sumn. 211, *The Brig Sarah Ann*.

But where the parties to the fraudulent conveyance both look upon it as a mere sham, and the property is left in the possession and control of the grantor as his other property is, it may well pass to assignees, when other property that has gone to the possession and use of the grantee,—it may be for valuable consideration, even, though fraudulent,—would not pass by the deed of assignment.

In this case, if the sale to Kremer was not held by either party to be real, but was only to deceive creditors, the property passed to the assignee by the deed in behalf of creditors, and is not subject to the execution.

RECENT ENGLISH DECISIONS.

*In the Prerogative Court.¹*NORTON AND OTHERS *vs.* BAZETT.

A testator wrote his will, and signed it in the presence of two persons summoned by him for the purpose; they took the will into an adjoining room to sign their names; the rooms communicated by a door, which was left open. There was no proof that the testator did actually see the witnesses sign their names: *Held*, that the signature of the witnesses was not made in the presence of the testator.

A question was raised in this case, whether a will, which had been signed by the testator in the presence of two persons, was also so subscribed by them in his presence as to constitute a due compliance with the words of the 9th section of the Wills Act, 1 Vict. c. 26, viz: "such witnesses shall attest and shall subscribe the will in the presence of the testator." Probate of the will in question had been refused on motion and it was now propounded by the executors in order to take the opinion of the court as to its validity. The will was drawn up by the testator himself in a very formal and circumstantial manner; and it appeared from the evidence of the attesting witnesses that the testator, who was a merchant in the city, after having been engaged in writing, called them into his room, which was separated from the office in which they sat, but communicated with it by a door, which was habitually kept open, and was so at the time of, and during the whole of the transaction; that on entering the room the testator was sitting at a table with his back to the wall separating the two rooms; that he said to them, "This is my last will and testament which I have made, and I require you to witness my signature;" that two sheets of paper, written on, were lying before him, on one of which, at the end of the will, he signed his name in the presence of both the deponents; that he then handed the sheet of paper to one of them, and requested him and his fellow-witness to sign their names, and to add the words, "Witnesses to the signature of William Norton;"

¹ From the London Jurist, for August 16, 1856.

that the table in the deceased's room was full of papers, and so, for convenience in signing, one sheet of the will was taken into the next room or outer office, the other was left on the deceased's table; that the deponents then both signed their names to the last sheet in each other's presence, standing whilst they did so at the corner of a desk which, of the others in the office, was nearest to the doorway leading into the other room. It appeared that this desk could be seen from some parts of the other room, but not from that part in which the deceased was sitting when the witnesses left for the purpose of subscribing the will, but that the chair in which the deceased sat was not above two yards from the partition wall, and that if he had moved a yard to his right hand from his chair, he could have seen the witnesses as they wrote their names; but whether he did so or not, the witnesses were unable to say. When they had both signed their names, one of them took back the paper to the testator, who then looked at the signatures, and made some remark as to the mode in which one of the witnesses had written his name; that the deceased was then standing up at the side of his table, which was parallel with the partition wall, with his back to the wall, and exactly in front of the chair on which he had been sitting when the witnesses left the room, but how long he had kept his chair the witnesses could not say; they neither saw nor heard him during the time they were out of his room, but the door remained open during the whole of the transaction. The witnesses were absent from the deceased's room about two minutes, the time required to sign their names.

Sir *J. D. Harding*, Q. A., and *Twiss*, in support of the will, contended that this amounted to a constructive if not an actual presence, and would have been a due execution under the Statute of Frauds; and that the case was distinguished from those where the testator was lying in bed or incapable of moving; here the deceased was found standing up, and there was nothing to rebut the presumption that he might have moved from his chair, and thus have seen the witnesses subscribe their names. They cited *Shires vs. Glasscock*, 2 Salk. 688; *Casson vs. Dade*, 1 Bro. C. C. 99; *Tod vs. Winchelsea*, 2 Car. & P. 491; *Winchelsea vs. Wauchope*,

8 Russ. 441; *Newton vs. Clarke*, 2 Curt. 323; and *Tribe vs. Tribe*, 1 Robert. 781.

Jenner and *Deane*, in opposition to the will, submitted that in order to bring the case within the doctrine to be gathered from the cases cited, it must be shown that the witnesses were at the time of subscribing their names within the possible range of sight of the testator. They cited *Davy vs. Smith*, 3 Salk. 395; *Doe vs. Manifold*, 1 Mau. & S. 294; and *In the Goods of Colman*, 3 Curt. 199.

Sir J. DODSON, after stating the facts: The question is, whether what took place, and the circumstances connected with it, render this a sufficient compliance with the 9th section of the Wills Act. It has been said that the law, notwithstanding the passing of the Wills Act, is the same as that resulting from the Statute of Frauds. That may be so, but the question has been fully discussed since the passing of the Wills Act, viz: in one of the cases cited at the bar—*Newton vs. Clarke*. The case of *In the Goods of Colman*, also cited, is very similar to this, and in both cases it was held that the statute had not been complied with. It is clear that the deceased could not have seen the witnesses at the time they subscribed their names, nor they have seen him, had he remained sitting in his chair where the witnesses left him. But it has been argued that the deceased might have moved from his chair, and then he could have seen them; but there is no proof that he moved. The witnesses only say he might have moved; and I think it would be going too far for the court to presume he moved, and so saw them sign; it would go beyond the decided cases. There must be proof that the testator was in such a position with relation to the witnesses that it was physically possible for him and them to have seen each other. The evidence adduced does not establish that fact, and I have no alternative, although I do so with great reluctance, but to pronounce against the probate of this will. The superior court may feel that it has a wider discretion. Decree the costs out of the estate.

SHORT NOTES OF CASES; BEING A SELECTION OF
RECENT ADJUDGED POINTS.GROVES *vs.* WRIGHT. 2 Kay & Johns. 347.

Legacy for Life—Farming Stock—Profits Distinguishable—A farmer gave his residuary real estate, and his farming stock and implements of husbandry, and residuary personal estate, to trustees, upon trust to permit his wife to have the full use, benefit, and enjoyment of the same during her life, and after her decease to sell the same, and divide the produce among his children. The widow, after the testator's death, carried on the testator's farm, and took additional land, to farm on lease, in the name of her son. It was held by Sir W. Page Wood, V. C., that the lease of the additional land, and the stock thereon, belonged to the widow's estate, and the stock on the original farm to the estate of her husband. "I cannot," said his Honor, "think that the doctrine relating to things *quæ ipso usu consumuntur*, can have any application to gift of farming stock. That doctrine applies to a personal use exhausting the subject of the gift. I must regard the intention of the testator. He says nothing, it is true, about carrying on the business; but what could the widow have done with the property so given to her? Could she have sold it? It might have been sold with her consent; but in that case, surely, the income only of the proceeds must have been paid to the widow for life. That is, perhaps, begging the question of the application of the doctrine as to things *quæ ipso usu consumuntur*; but no case has been cited in which the whole of the testator's farming stock having been the subject of the gift, that doctrine has been held to apply. When all the wine in a house is given to one for life, of course the legatee for life may drink it. And there was a case in which carriage-horses were held to come within the same rule; but there the tenant for life had actually used them. Here the farming stock is given for the benefit of the testator's widow for life. She could not personally use it so as to consume it; the only use she could so personally make of it would be to sell it. By such a bequest, the testator must, I think, have intended that his widow should have the use of the stock, contemplating that she would carry on the business of the farm with it. She might have allowed the stock to be sold, and have taken the income of the produce for life, leaving the capital to the legatees in remainder, or if not, I must suppose that the testator contemplated that she would carry on the business; and if, in the course of such business, it was necessary that any part of the farming stock should be sold, then the substituted stock would follow the course of the original subject of the bequest.

FORSHAW *vs.* HIGGINSON. 20 Beav. 485.

Trustee—When and upon what Terms he can Retire from the Trust—

In this case the Master of the Rolls has laid down some very useful rules upon a subject very bare of authority; *viz.* how far a trustee is justified in retiring from acting in the trusts.

“A trustee,” said his Honor, “cannot from mere caprice retire from the performance of his trust, without paying the costs occasioned by that act. Any circumstances, however, arising in the administration of the trust, which have altered the nature of his duties, justify him in leaving it, and entitle him to receive his costs; but to justify him in that course, the circumstances must be such as arise out of the administration of the trust, and not those relating to himself individually.”

A trustee desirous of retiring from the trust, on the ground of want of confidence in his co-trustee, cannot properly get rid of the trust by procuring the co-trustee, in whom he felt no confidence, to appoint in his place another person, not only not sanctioned, but opposed and objected to by the *cestui que trust*; “for although,” said his Honor, “I do not say he would have been liable for any misconduct that might afterwards have been committed by the trustees, yet the court would certainly have greatly disapproved of such a proceeding, and he would have rendered himself liable to great risks, such as no trustee should be called upon to incur.”

In *Forshaw vs. Higginson*, a trustee, for reasons of a private nature not arising out of the trusts, not feeling confidence in his co-trustee, was desirous of retiring from the trusts. The *cestui que trust* refused to give him a release. It was held by Sir J. Romilly, M. R., that he was justified in instituting a suit asking to be discharged from the trusts, and offering to account, inasmuch, as although he was desirous of retiring, from private circumstances, he would not have been justified in simply retiring and getting his co-trustee, in whom he had no confidence, to appoint a new trustee. The trustee was also allowed his costs. His Honor, however, said, as in this case the desire of the trustee to retire arose out of private circumstances, and not out of the administration of the trust, that if on the application of the trustee to be discharged, his *cestui que trust* had said, you must pay the costs of the appointment of the new trustees, which would have been the mere costs of an endorsement on a deed, and had he refused to do that, he should not have supported the plaintiff in instituting a suit, by giving him the costs thereby occasioned.

REG. *vs.* LEGGATT. 18 Q. B. 781.

Habeas Corpus by Husband to regain Custody of Wife—This was a rule calling on Mr. Leggatt, at the instance of Mr. Sandilands, to show cause why a *habeas corpus* should not issue to bring up the body of the applicant's wife, who was not on good terms with the applicant, and voluntarily resided with Mr. Leggatt, her son. On cause being shown, the Court of Queen's Bench discharged the rule, holding that where a wife is, by her own desire, living apart from her husband, and is under no restraint, the court will not grant a *habeas corpus* on the application of the husband, for the purpose of restoring her to his custody.—(See *Re Cochrane*, 8 Dowl. 630; and *Rex vs. Mead*, 1 Burr. 542.)

BARKER *vs.* THE MIDLAND RAILWAY COMPANY. 18 Com. B. 46.

Railway Company—Right of, to exclude Vehicles from their Station-yard—This was an action by the plaintiff, an omnibus proprietor, who carried passengers and their luggage for hire to and from a railway-station of the defendants, for a refusal by the defendant's servant to allow him to drive his vehicle into the station-yard. There were demurrers and cross-demurrers raised by the pleadings, and the court decided in favor of the defendants, on the ground that no duty was shown on the defendants' part to permit the plaintiff to come upon their land.

NEWARK PLANK ROAD *vs.* ELMER, 1 Stock. N. J. Chanc. Rep. 754.

Obstructions to navigation under authority of charter.—By the eighth section of the act incorporating the Newark Plank Road and Ferry Company, they are authorized to construct a plank road, to commence in the city of Newark, east of Broad street; and thence passing by the most convenient and direct course, to the bank of the Passaic river, near the old ferry, and across the meadow between the Passaic and Hackensack rivers, and through the county of Hudson in the most eligible route to its point of termination in said county and opposite the city of New York; and that it shall be lawful for the said company at any time to drive piles and erect or build piers, wharves, platforms, ferry stairs, or other works necessary for the said road and ferrys thereon in the said Passaic and Hackensack rivers; provided always that the free and uninterrupted navigation of vessels in said rivers or either of them, is not thereby prevented by any bridge or other obstruction in any manner whatever.

The eleventh section provides that the company shall keep and maintain two good and sufficient ferry boats at the respective ferries on each of the said rivers and shall cause lamps to be put up at the extreme point of each pier at said ferries which shall be lighted before dark every evening, and kept lighted until daylight next morning. After the company had driven piles and indicated the distance to which they intended to project piers into the river, a bill was filed praying an injunction restraining the said company from projecting piers, &c. into the Passaic river, and from obstructing the free navigation of said river.

Held, that the act gives the company the right to extend their works beyond the banks of the river; that the language of the proviso assumes that the works authorized will be an obstruction to the river, but provides that no such obstruction shall be built or erected as would prevent the free and uninterrupted navigation of vessels in the river.

As the plan of the company mentioned in the bill and answer, and upon which they were proceeding to construct their works in and over the river, extended into the river to the obstruction of navigation beyond what was necessary for the purposes of, and contemplated by the act of incorporation, an injunction was allowed, restraining the defendants from constructing their works upon that plan.

Held, That if the contemplated plan would occasion an obstruction to the navigation of the river beyond what the charter authorized, the works would be a nuisance.

Every erection in a navigable river which detracts or hinders the navigation, is a nuisance.

It is well settled that grants of this nature are to be construed strictly, and not extended beyond what is reasonably necessary for the purpose the act contemplates.

The issue made is that the piers were proposed to be built as the charter authorized, and would not prevent the free and uninterrupted navigation to any greater extent than was intended by it. The question is as to the meaning of the charter. It is too plain to admit of a reasonable doubt that, independent of the charter, they would constitute a nuisance.

KEAN vs. JOHNSON, 1 Stock. N. J. Ch. Rep., 401

Authority of a majority of the stockholders in a corporation to vary their business.—When a board of directors or a majority of stockholders deviate from the originally contemplated undertaking, the “rights” of other and dissenting stockholders are “affected,” and as against them they cannot legally do it.

A majority of stockholders in a prosperous corporation cannot at their own mere caprice, sell out the whole source of their emoluments and invest their capital in other enterprises where the minority desire the prosecution of the business in which they had engaged. The contract is, that their joint funds shall, under the care of specified persons, generally called directors, be employed, and that for certain specified purposes.

Where the duration of such employment is limited in the charter, until that time it must continue so employed, unless perhaps in case of clear loss. If no time is fixed by the charter, at which the proposed use of the capital shall cease, the contract is, that so long as the affairs of the company are prosperous it shall go on, unless all consent to the contrary.

How far, under what circumstances, and upon what application a court of equity would restrain a corporation from an improper alienation of its property, must depend upon the general principles which guide it in the exercise of its powers; but in a proper case made, it would interfere to prevent a disposition of its property for other than corporate purposes.

"It is the right of a partner to hold his associates to the specified purposes whilst the partnership continues."

In the enacting section of the charter of a railroad, the words "and they and their successors by the said name and style shall be capable of purchasing, holding, and conveying, any lands, tenements, goods and chattels whatever necessary and expedient to the objects of this incorporation, only authorize property to be sold and conveyed away, when it is necessary or expedient to the objects of the incorporation. The objects of the incorporation cannot require that the necessary source of its profitable existence should be sold and conveyed away.

A supplement to the act of incorporation of a railroad company authorizing the company to purchase the road constructed by another company, and declaring that the purchased road should become a part of the road authorized to be constructed by the charter, contained a proviso: That nothing in this act contained, shall in anywise affect any right whatever, either at law or in equity of any stockholder or other person in, or any claim or demand against the company whose road it was contemplated to purchase. Held, that the purchase authorized by the supplement did affect the rights of the stockholders in the company whose road was to be purchased. And that the legislature intended when they provided that nothing in that act contained should in anywise affect any right whatever, that such purchase should not occur without that which alone could prevent its affecting such rights, viz: the consent of every stockholder.

Quære. Whether a supplement authorizing any deviation from the original charter and not requiring the consent of all the stockholders is unconstitutional.

Where the company whose road was purchased under the above supplement and who were not a necessary party to any of the different kinds of relief prayed, had not been made a party to a bill filed by one who was a protesting stockholder, against the directors of both roads and the company in possession of the road, and all its property but the franchise; and the objection was not taken until the hearing of a general demurrer to the equity of the bill; the court disposed of the case on its merits without requiring such formal parties to be joined.

ATTORNEY GENERAL *vs.* PATTERSON, 1 Stock. N. J. Chanc. Rep. 624.

Injunction—irreparable mischief.—The object of a preliminary injunction is to prevent some threatening irreparable mischief, which should be averted until opportunity is afforded for a full and deliberate investigation of the case.

Where it does not appear that irreparable mischief is liable to ensue from leaving a party to go on exercising a right he claims, the court never stops him before it has an opportunity of examining the question of right. The mere erection of a house, intended as a poor and work-house, is in itself no injury to anybody; nor is the sending of paupers into a township or county illegally, or keeping them there a few months, a case of irreparable mischief.

Where at the time a preliminary injunction was applied for, the main question in the cause, which was essentially a question of law, was pending before a court of law, the application was refused. The rule has been long established that, in such cases, a court of equity does not interfere by injunction until the question of right is determined.

MORRIS AND ESSEX R. R. *vs.* BLAIR, 1 Stock. N. J. Chanc. Rep. 635.

Right to surveyed route by railroad company.—Two railroad companies were incorporated to complete two independent lines across the State. No route was prescribed to either other than the termini. There was no conflict of routes on the face of the charters, and no necessary conflict in carrying out the objects of the charters.

Held, that the prior right attached to the company which first actually surveyed and adopted a route and filed their survey in the office of the Secretary of State.

That as no specific route was granted to either company, a right to no particular place accrued to either until they had selected or determined upon a location. That no importance should be attached to the fact that the charter of one company was passed seven days before that of the other.

The mere experimental surveying of a route will not confer any vested or legal right until it shall have been adopted.

By adopting and filing a survey of their route, a company acquire a right to obtain the lands over which it passed; and they cannot be deprived of that right by another company purchasing and taking deeds for those lands, even if made without notice.

Such conveyances could at most put the purchasers in the condition of land owners, liable to have their lands taken upon making compensation.

DAVIDSON vs. ISHAN, 1 Stock. N. J. Chanc. Rep. 186.

Nuisance in the use of a Steam Engine.—There may be circumstances where even the noise of a steam engine may become a private nuisance, and its use on that account, be restrained by the court. But it would seem that the use of a steam engine is not *prima facie* a nuisance on account of its danger to life from explosion.

The machinery of a mill, which adjoined private dwellings in a densely populated part of a city, was driven by a steam engine. The complainants alleged that the lives of those residing in the neighborhood were exposed to the danger of the bursting of the boiler of the steam engine, that the working of the steam engine and machinery, shook the adjacent houses, and particularly two of the houses owned by one of the complainants, that the business there carried on caused smoke, steam, vapor, and unwholesome stenches of a nauseous and disgusting character, rendering it uncomfortable to dwell in the vicinity. The defendants denied that their business as carried on was a nuisance, and alleged that the facts upon which the complainants rely, had been submitted to the proper tribunal for trying issues of fact, and that the issue had been found in their favor.

Held, that the business being a lawful one, the question of nuisance is a matter of fact to be determined by the evidence; that upon conflicting testimony, this court would not interfere where the question of fact had been previously submitted to a court of law whose peculiar province it is to determine questions of law involved in the issue, and to guide and direct the jury to a proper result. That it is not necessary to constitute a nuisance, that the smell should be unwholesome, it is enough if it render the enjoyment of life and property uncomfortable.

THE MORRIS CANAL CO. vs. FISHER, 1 Stockton's N. J. Chanc. Rep. 667.

Title to Coupon Bonds by delivery.—Coupon bonds payable to bearer, although not negotiable under the law merchant as bills and notes, are instruments of a peculiar character, and being expressly designed to be passed from hand to hand, and by common usage actually so transferred are capable of passing by delivery so as to confer a complete title in the possessor. They are the subject of pledge.

CROUCH vs. THE GREAT NORTHERN RAILWAY, 25 L. Jour. Rep. 137. Ext.

Carrier—Railway Company—Packed parcels—Enclosures—Misdirection—Damages for loss of custom.—A declaration by a carrier against a railway company for not carrying a parcel to Leeds in a reasonable time, and for not delivering it, laid, as damages, that the plaintiff was injured in his trade as a collector of parcels, and lost the custom of several persons. The plaintiff, a carrier in London, was in the habit of collecting in London small parcels from different persons to be sent to various persons in the country.

After collecting them, he used to make them into one parcel, called a "packed parcel," which he directed to his agent in the country, and brought to the defendants to be carried. The plaintiff was also in the habit of bringing to the defendants for carriage into the country, parcels containing other small parcels, belonging to one individual in London, and sent by him to one individual in the country. These parcels were called "enclosures."

The defendants charged the plaintiff at a higher rate for "packed parcels" than for "enclosures," and they also charged him at a higher rate than the rest of the public. The learned judge stated to the jury that an action of trover against the defendants could not be brought by each of the owners of the packages contained in the "packed parcels" in the event of loss or mis-delivery, although an action might lie by each owner for the destruction of the packages by the defendants, independently and beyond their duty as carriers. He also left it to the jury to say whether there was a difference as regarded the risk between carrying "packed parcels" and "enclosures." The jury found that there was no substantial difference as regarded the risk of carrying the two kinds of parcels; and they found a verdict for the plaintiff, damages £200, on the ground that the plaintiff had sustained injury in his trade and loss of custom to that extent, in consequence of the defendants' acts: *Held*, that the judge rightly directed

the jury, the question of risk as regarded the two kinds of parcels being a question of fact and not of law. *Held*, also, that as the declaration was framed, the plaintiff was not entitled to recover the £200 as damages for the injury to his trade and loss of custom.

Seemle, per Martin B., that if the fact had been that the plaintiff was a carrier whose business consisted in collecting goods to be forwarded by the defendants' railway, and that the defendants designedly refused to carry his parcels, which they were bound by law to carry, in order to obtain a monopoly and to destroy the plaintiff's business, under such circumstances a jury would be justified in giving very heavy damages.

NOTICES OF NEW BOOKS.

TREATISE ON THE NATURE, PRINCIPLES AND RULES OF CIRCUMSTANTIAL EVIDENCE; especially that of the presumptive kind in Criminal Cases. By Alexander M. Burrill, Counsellor-at-Law; author of the new Law Dictionary, Law of Voluntary Assignments, &c. &c. New York: John S. Voorhies, 20 Nassau street. 1856. pp. 796.

This is an elaborate volume on that interesting branch of law known to the profession and generally to educated laymen by the name of circumstantial evidence. Few great criminal trials are ever conducted without a large use of this branch of law, and a complete and comprehensive treatise containing all the cases was much needed.

The whole subject, the author tells us in his preface, is comprised in two parts. In the first of these, which is introductory to the other, after some elementary explanations of the nature of evidence, a considerable space is devoted to the illustration of the principle of presumption as founded in nature, and the manner in which it is applied to the development of truth in matters of science as well as in ordinary life. This is followed by a general view of the nature and operation of circumstantial evidence, as an instrument of judicial investigation in criminal cases; presenting, first, the object of inquiry or fact sought; next the facts which are to constitute a basis for the inferences by which it is to be reached; next, the process of inference itself; and finally, the conclusion arrived at or verdict given.

In the second part, the subject is considered exclusively in a judicial point of view, and is treated in detail, with as much minuteness as the limits of the work would allow. The order adopted is the natural one; present-

ing, first, the elements or materials of which the evidence is composed, and, next, the manner in which they are applied to the purposes of proof, with the principles and rules governing such application. Under the first of these heads a large number of facts has been brought together and classified under convenient divisions. Nearly all these facts (especially those of the criminative class) have been extracted with considerable labor from cases of actual occurrence, which are minutely referred to throughout; thus furnishing a digest or repository of useful matter not otherwise easily accessible.

This plan has been faithfully carried into execution and the views presented in a masterly manner, alike creditable to the industry and scholarship of the learned author. The references to the cases are very numerous, embracing most of the celebrated trials which have happened in this country or England. This fact causes the volume to be no less entertaining than instructive, and we cannot send our readers to any volume at once so useful and so full of interest.

THE LAW OF CONTRACTS. By JOHN WILLIAM SMITH, Esq., author of "Leading Cases," "Law of Landlord and Tenant," &c. Fourth American, from the Second London Edition, by John George Malcolm, Esq. With Notes and References to both English and American Decisions, by William Henry Rawle. And with Additional Notes and References to recent American Cases, by the Hon. George Sharswood. Philadelphia: T. & J. W. Johnson & Co. 1856. pp. 498.

Any good book on the law of contracts must command professional attention. No branch of law is of such universal and such constant application as the doctrines involved in contracts. This book having already been re-produced four times in this country, no notice would seem to be necessary at our hands, a reputation having been firmly established.

The American Notes by able and well known editors add greatly to the value of the treatise itself, and have, without doubt, aided much in bringing it into professional use. Indeed, it would seem now to be quite indispensable in the re-production of English books to add American Notes by competent hands; the American decisions being as important and sometimes as numerous as the English.

THE

AMERICAN LAW REGISTER.

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DECEMBER, 1856.  
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OFFICE AND DUTIES OF ATTORNEY GENERAL.¹

EXPOSITION OF THE CONSTITUTION OF THE OFFICE OF ATTORNEY GENERAL AS A BRANCH
OF THE EXECUTIVE ADMINISTRATION OF THE UNITED STATES.

ATTORNEY GENERAL'S OFFICE, }
March 8th, 1854.

SIR: At the expiration of a year's experience in the discharge of my present official duties, and observation of their relation to other branches of federal administration, it seems to me not unseasonable now to lay before you some suggestions of possible improvement in the manner of conducting the legal business of the government.

The Constitution of the United States provides, that "the executive power shall be vested in the President of the United States," who shall be Commander-in-chief of the Army and Navy; who shall, by and with the advice and consent of the Senate, make treaties; who shall nominate, and by and with the advice and consent of the Senate, appoint, all officers of the United States, military, judicial, diplomatic, or administrative, whose appointments are not otherwise

¹ From official opinions of Attorneys General of the United States, vol. vi. Edited by C. C. Andrews, Counsellor at Law; not yet published.

provided for, and which shall be established by law; who shall have a qualified participation in the enactment of laws, and take care that they be faithfully executed; and who shall, from time to time, give to Congress information of the state of the Union.

The President is thus made the responsible depositary and chief functionary, for the time being, of the ministerial powers and administrative duties of the United States, regarded as a political sovereignty.

But the constitution does not specify the subordinate ministerial, or administrative functionaries, by whose agency or counsels the details of the public business are to be transacted. It recognizes the existence of such official agents and advisers, in saying, that the President "may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices;" and these officers are again recognized by the constitution in the clause which vests the appointment of certain inferior officers "in the heads of departments;" and it leaves the number and the organization of those departments to be determined by Congress.

In the execution of this duty, the constitutional Congress proceeded, at an early day of its first session, (July 27, 1789,) to establish the Department of Foreign Affairs, with "a principal officer therein," to be called the Secretary for the Department of Foreign Affairs, and to perform and execute such duties respecting foreign affairs as the President should assign to him, and to conduct the business of the department in such manner as the President should, from time to time, order or instruct.

But this act, which was the commencement of the organization of executive departments under the constitution, and a commencement in the direction of a systematic and proper distribution of duties, gave place, after the lapse of a few months, (September 15, 1789,) to an act, which changed the name of the Department of Foreign Affairs to that of Department of State, though it in no respect changed the duties of the Secretary, except to provide that he should receive, keep, and cause to be promulgated, the laws enacted by Congress; and that he should keep the seal of the

United States, and affix the same to the commissions of all civil officers of the United States lawfully appointed by the President, whether with or without the advice and consent of the Senate.

In changing the name of this department from Foreign Affairs to that of State, Congress did not change the main duties of the department, consisting then, as now, of the charge of the foreign relations of the government. There is no very obvious connexion between the new name given to the department, and the only important fact which accompanied the change, namely, the commitment of the seal of the United States to the secretary, and the duty of affixing it to the commissions of civil officers. If on this account, as it would seem, the designation of the secretary was changed, certainly the new title had not, according to the received previous use of the term in our mother tongue, any special relation to the new duties, it not being coupled with the custody of the great seal in England, and being applied there to the office of several of the principal secretaries. Probably it was deemed convenient, in that early period, when the public business was little in amount relatively to latter times, that the head of the most important of the departments should bear a name indicative of higher general and political duty, and so indefinite, that much miscellaneous business might be consigned to his charge, either by act of Congress, or by direction of the President.

Next, after establishing the Department of Foreign Affairs, Congress, at the same session, (August 7, 1789,) established the Department of War, with a principal officer therein, to be called the Secretary for the Department of War, and required to perform such duties as might from time to time be lawfully enjoined on or intrusted to him by the President, relative to military or naval affairs; and to conduct the business of the department in such manner as the President might from time to time order or instruct.

This department was also formed on proper premises of classification, even though including, as it did, the jurisdiction of Indian affairs; for the arrangement of frontier posts, and other considerations, devolved of necessity, at that period, the charge of the Indians on the Secretary of War.

Next came, at the same session, (September 2, 1789,) a Department of Treasury, (not *the* Treasury,) the head of it, however, being called the Secretary of the Treasury, and his general duty being defined to be to digest and prepare plans for the improvement and management of the revenue, and for the support of public credit; to prepare and report estimates of the public revenue and the public expenditures; to superintend the collection of the revenue; to grant warrants for money to be issued from the treasury in pursuance of appropriations by law: and to have charge of the sale of the lands belonging to the United States.

In the organization of the business of this department by this act, facts peculiar, as compared with the other two departments, are prominent.

One is, that the Secretary of the Treasury, instead of being made subject only to the direction of the President by name, is required "generally to perform all such services, relative to the finances, as he shall be directed to perform;" which phraseology has relation to the provision of the act, that he shall "make report and give information to either branch of the legislature, *in person or writing, as he may be required*, respecting all matters referred to him by the Senate or House of Representatives, or (and) which shall appertain to his office."

Another peculiarity of the act is, that whereas, in the others, provision is made for a chief and other clerks only, here, on the other hand, is the commencement of sub-departments, or bureaus, commonly so called, in the provision for the appointment of a comptroller, an auditor, a treasurer, and a register, among whom a portion of the business of the department is distributed permanently and upon system.

At the same session of Congress, in organizing the judicial business of the United States, (September 24, 1789) provision was made for an Attorney General, to prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned, and to give his advice and opinion upon questions of law, when required by the President of the United States, or when requested by the heads of any of the departments, touching any matters which may concern their departments.

By another act of the same session of Congress, (September 22, 1789,) the office of Postmaster General was appointed, with an assistant, or clerk and deputies, subject, in performing the duties of his office, and in forming contracts for the transportation of the mail, to the direction of the President, but not in other respects then placed in the same high official relation to the government as at the present time.

Such was the original basis of the executive organization of the government. The Secretary of State for political and foreign affairs, the Secretary of War for military and naval matters, the Secretary of the Treasury for those of finance, and the Attorney General for legal and judicial ones, were the immediate superior ministerial officers of the President, and his constitutional counsellors during the period of the administration of Washington.

We find abundant evidence, both in the public archives and in the printed correspondence and other writings of Washington and Jefferson, that it was the practice in their time for the President not only to call for written opinions of the Attorney General, as at present, and to advise orally or by informal correspondence with him and the three Secretaries, but also to require of all these officers written opinions upon critical subjects of executive deliberation, as expressly provided by the constitution.

Conspicuous illustration and evidence of these facts may be deduced from the extracts given in the text and the notes to Washington's writings. (See *e. g.*, vol. x, p. 321, note; vol. x, p. 546, note.) In one of these cases it will be perceived that the Cabinet, so called, consisting of the Secretary of State, Secretary of the Treasury, Secretary of War, and Attorney General, though not in any sense an organized body with legal attributes as such, yet proceeded to act in concert, adopting joint rules, signed by them, as to the political and military questions pending between the United States and France.

By an act of the next Congress, various modifications were made in minor details of the duty of the Secretaries of Treasury and War and of the Attorney General. (May 8, 1792.)

Meanwhile an organization had been effected of all those branches

of the public service which are localized in the States, including, among other things, officers of the revenue, deputy postmasters, courts, and ministerial officers of the law, and the survey and sale of the public lands; but no material modification occurred in the great outlines of superior administration, until during the administration of John Adams, when the magnitude of our commerce, and the importance of our maritime relations, induced the government to pay more attention to the military marine, and to establish the Department of the Navy, the chief officer of which to be called the Secretary of the Navy, whose duty it should be to execute such orders as he might receive from the President relative to the procurement of naval stores and materials, and the construction, armament, equipment, and employment of vessels of war, as well as to all other matters connected with the naval establishment of the United States. (April 30, 1798.)

Subsequently to this, and in the long period of the administrations of Jefferson, Madison, Monroe and John Quincy Adams, no change in the general character of the executive departments took place, although all of them underwent more or less modification in details, by the intertransfer of old, or the creation of new branches of business, and especially the establishment of new bureaus, or the enlargement of old ones, materially affecting the internal organization of the Departments of State, War, Treasury, Navy, and Post-Office.

But, at the opening of Jackson's administration, the Postmaster General, whose duties and responsibilities had grown with the growth of the country to be of vast importance, was called, as the public interests required he should be, to the same duties of a cabinet counsellor of the President, which had been discharged theretofore by the four Secretaries and the Attorney General.

This fact constitutes the first important alteration in the arrangements of superior administrative duty and accountability which had occurred since 1798, when the Department of the Navy was established.

Perhaps an equally important fact occurring at the same period, was the decision, by Jackson, in the circumstances attending the removal of Mr. Duane, as Secretary of the Treasury, and the ap-

pointment of Mr. Taney, of the question of the responsibility of the heads of departments to the President.

Finally, by an act passed at the close of Mr. Polk's administration, (March 3d, 1849,) in order to relieve the Departments of State, War, Treasury, and Navy, of branches of public business, created from time to time, which,—attached to those offices originally from considerations of fitness which had ceased to exist, or from the want of any more convenient destination to be given to them, now required to be placed in other hands,—a new executive department was organized, to be called the Department of the Interior, to the secretary of which was committed the supervision of the Patent Office, the General Land Office, the accounts of officers of the courts of the United States, Indian Affairs, the Pension Office, the Census, Mines, and the Public Buildings.

This act, it should be observed, does not provide in terms that the Secretary of the Interior shall be subject to the general direction of the President, as in the case of the Secretaries of State, War, Navy, and Postmaster General; nor do the acts appointing the Secretary of the Treasury and the Attorney General. On the other hand, none of the acts, except that establishing the Treasury Department, subject the chief executive officers to the duty of responding to direct calls for information on the part of the two Houses of Congress. This, however, has come, by analogy or by usage, to be considered a part of their official business. And the established sense of the subordination of all of them to the President, has, in like manner, come to exist, partly by construction of the constitutional duty of the President to take care that the laws be faithfully executed, and his consequent necessary relation to the heads of departments, and partly by deduction from the analogies of statutes.

One other fact which has been alluded to already, requires more particular attention.

It is the constitutional duty of the President, and of course his right, to recommend legislative measures to Congress, which is in effect the suggestive initiation of laws. By express provision of law, it is made the duty of the Secretary of the Treasury to communi-

cate information to either House of Congress when desired ; and it is practically and by legal implication the same with the other secretaries, and with the Postmaster and Attorney General. But the provision of law, which enacts that the Secretary of the Treasury shall make report and give information to either branch of Congress *in person*, when required, and which, if carried into operation, would in fact confer on the Secretary the advantage, though not a member of Congress, yet of explanatory discussion both in the Senate and the House of Representatives, does not appear to have been at any time practiced upon by Congress, either in regard to the Secretary of the Treasury or any other head of department by analogy. But heads of departments have in some cases been called on to make explanations in person to committees of Congress.

It has appeared necessary to take this retrospective survey of the formation of the several executive departments, and of their general relation one to another, as preliminary to an explanation of the manner in which existing laws provide for the superintendence and management of the judicial and legal business of the government.

We have seen that the act establishing the office of Attorney General expressly imposed on him two classes of duty : first, to prosecute all suits in the Supreme Court in which the United States are concerned, and secondly, to give his advice and opinion in questions of law to the President and to the heads of departments.

In the discharge of the second class of the above mentioned duties, the action of the Attorney General is quasi-judicial. His opinions officially define the law, in a multitude of cases, where his decision is in practice final and conclusive,—not only as respects the action of public officers in administrative matters, who are thus relieved from the responsibility which would otherwise attach to their acts,—but also in questions of private right, inasmuch as parties, having concerns with the government, possess in general no means of bringing a controverted matter before the courts of law, and can obtain a purely legal decision of the controversy, as distinguished from an administrative one, only by reference to the Attorney General.

Accordingly, the opinions of successive Attorneys General, pos-

essed of greater or less amount of legal acumen, acquirement, and experience, have come to constitute a body of legal precedents and exposition, having authority the same in kind, if not the same in degree, with decisions of the courts of justice.

It frequently happens that questions of great importance, submitted to him for determination, are elaborately argued by counsel; and whether it be so or not, he feels, in the performance of this part of his duty, that he is not a counsel giving advice to the government as his client, but a public officer, acting judicially, under all the solemn responsibilities of conscience and of legal obligation.

Although the act, requiring this duty of the Attorney General, does not expressly declare what effect shall be given to his opinion, yet the general practice of the government has been to follow it;—partly for the reason already suggested, that an officer going against it would be subject to the imputation of disregarding the law as officially pronounced, and partly from the great advantage, and almost necessity, of acting according to uniform rules of law in the management of the public business: a result only attainable under the guidance of a single department of assumed special qualifications and official authority.

But the Attorney General is under no obligation to render an award, or determine a question of fact in cases referred to him; nor does an appeal to him lie from another department by any party assuming to be aggrieved by its action, and seeking to have it reviewed; nor is he to give advice to heads of departments on matters which do not concern their departments, and in which the United States have no interest; nor is he authorized to give official opinions in any case not falling within the scope of his duties, so as to connect the government with individual controversies, in which it has no concern, and with which it ought not to interfere; nor is he in general to give official opinions to subordinate officers of the government; nor ought he to advise individuals in regard to any question of legal right depending between them and the government. Some uncertainty has existed upon the point whether it is the duty or the right of the Attorney General to give *mere legal* opinions to the Senate or the House of Representatives, it having

been denied in one case by Mr. Wirt. But he, in common with other persons holding the office, has recognized, by his action in sundry cases, the right of either House of Congress to call on him for information in any matters within the scope of his office, and his duty to communicate the same.

The other duty prescribed by the act of 1789, that of conducting the suits of the United States in the Supreme Court, is, of course, the function of an advocate, subject to the conditions only of the conscientious and honorable discharge of such a function, and with official relation both to the government and the Supreme Court.

The act speaks of the Supreme Court alone, and it is the regular statute duty of the Attorney General only to conduct in person the causes of the United States there; but the President may undoubtedly, in the performance of his constitutional duty, instruct the Attorney General to give his direct personal attention to legal concerns of the United States elsewhere, when the interests of the government seem to the President to require this. An example of this, having the force of contemporaneous exposition, occurs in the case of the instructions of Washington to the Attorney General, in 1792, to attend the Circuit Court at York, on occasion of certain indictments pending there, "to see that that business be conducted in a manner to which no exception can be taken with propriety, and for the purpose of giving to the measures of government a more solemn and serious aspect." This precedent has been followed in other and later cases, which seem to call for the special direction of the government.

At successive periods in the history of the government, the Attorney General has been invested with various other powers and duties, some of them special and temporary, and some permanent, some of them purely legal, and some administrative rather than legal, but all of them having apparent relation to the general nature of his office, and which it may be well to briefly indicate.

By an act passed at the second session of the first constitutional congress, (April 10, 1790,) the foundations were laid for the system of granting letters patent of exclusive privileges for useful inventions or discoveries, this branch of public business being placed in

the joint charge of the Secretaries of State and War and the Attorney General. Subsequently, (February 21, 1793,) it was committed to the charge, first, of the Secretary of State,—then of a bureau created for it, under the immediate authority of a special commissioner, and subject to the supervision of the Secretary of State,—until, as before stated, it was transferred to the new Department of the Interior.

By the act establishing the Mint of the United States, it was required that the Chief Justice of the United States, the Secretary and Comptroller of the Treasury, the Secretary of State, and the Attorney General, should constitute a board to inspect the assay of gold and silver for coinage; (April 2, 1792;) but this duty has been transferred since to the district judge and district attorney of Eastern Pennsylvania.

That was a duty administrative in its nature; as was that under the provision of law, which appointed the Attorney General, together with the Secretary of State and the Postmaster General, a board to prepare forms and schedules for the agricultural, commercial, and other statistical facts to be collected in the taking of the seventh census of the United States, (March 3, 1849.)

In a very early case of commissioners appointed under treaty to adjudicate claims provided for thereby, it was made the duty of the President to appoint a person to act before such commissioners, in behalf of the United States, under the direction of the Attorney General, who was required to counsel such agent, and to attend in person whenever any questions of law or fact to be determined by the commissioners might render his presence necessary; and he was authorized to employ such agents, in the different parts of the United States, as the business before the commissioners should, in his opinion, require, and to be paid for their services at such rate as the President of the United States might order. (June 30, 1797.)

If the same proceeding, or something analogous to it, had been adopted in regard to some later cases of the same character, so as to ensure a contentious investigation of all claims presented, it would have tended greatly to guard the responsibility and facilitate

the safe action of the commissioners, and to produce results more satisfactory to the interests of the government.

The Attorney General has himself been called on to act as commissioner to adjudicate claims under treaty, as in the case of the convention of indemnities between the United States and the Republic of Peru. (August 8, 1841.)

But the most serious of his incidental duties has been that of supervising the litigation of land claims arising under cessions of territory made to the United States by France, Spain, or the Mexican Republic.

By a series of acts for the adjudication of land claims under the treaties ceding Louisiana and Florida to the United States, it was made the duty of the Attorney General to decide on appeals from the district courts in which the claims were in the first instance litigated; to instruct the district attorney in regard to them, and to appear and prosecute those appeals in the Supreme Court. (May 26, 1824.)

By the various provisions of law for the adjudication of land claims in California, it is in like manner made his duty to receive and examine the transcripts of cases decided by the commissioners, before whom they are in the first instance to be heard, and determine which of the cases shall be appealed to the district courts and to the Supreme Court of the United States, (March 3, 1851, and August 31, 1852.) This branch of business, though in some sort temporary in its character, yet involves responsible present relations to and ultimate management of a large number of suits of the highest importance and interest, and therefore constitutes one of the most onerous of the present occupations of the Attorney General.

Another class of duties of a permanent nature, and of constant recurrence, is the examination, which he is required to make, of all titles of lands or sites purchased by the United States for the purpose of erecting thereon armories, arsenals, forts, fortifications, navy yards, custom houses, lighthouses, or other public buildings of any kind whatever; and without his certificate of the validity of the title, no public money can be expended upon any such land or site. (September 11, 1841.)

In all cases of suspended entries of public lands, the approbation of the Secretary of the Interior and of the Attorney General is necessary to the valid adjudication of the same by the commissioner. (August 8, 1846, and March 8, 1853.)

Finally, in regard to the great variety of duties appointed for the Solicitor of the Treasury, including the collection of debts due to the government, the disposition of property taken by execution in its behalf, the management of suits in the local courts of the United States, and the instruction of district attorneys and marshals in the premises, (concerning which business more will be said hereafter,) it is made the duty of the Attorney General, at the request of the Solicitor, "to advise with and direct" him in such matters. (May 29, 1830.)

It remains only to say, in speaking of the legislation of Congress in regard to the office of Attorney General, that his department, in common with the others, has an official seal, and all copies of records authenticated by certificate under this are declared to be evidence equally with the original record or paper; that he, in common with other officers of the same class, appoints the clerks or other persons allowed by law for the service of his office, in virtue of the clause of the constitution authorizing certain appointments to be vested in the heads of departments: and he exercises all such general powers as are by law vested in them, such for instance as the employment of counsel or other legal assistance in behalf of the United States.

Such are the general duties, ordinary and extraordinary, of the office of Attorney General, as expressly set forth by statute, and in addition to implied contingent duties, which, as already intimated, he may be called upon by the President or the Houses of Congress to perform.

On this point, which has been touched already, it may not be amiss to state more fully the constitutional and legal nature of the relation of the President to the heads of departments in matters of detail not explicitly provided for by the acts of Congress.

We have cursorily seen that the act establishing the Department of State provides that the Secretary shall "perform and execute

such duties as shall, from time to time, be enjoined on, or intrusted to him by the President, agreeably to the constitution, relative to correspondence, commissions, or instructions to or with public ministers or consuls from the United States, or to negotiations with public ministers from foreign states, or princes, or to memorials or other applications from foreign public ministers or other foreigners, or to such other matters respecting foreign affairs as the President of the United States shall assign to said department;" but the act does not say that the President may assign to him, or that he shall perform, any duties not relating to *foreign* affairs of the government. It proceeds further to provide that he shall "*conduct the business of the said department in such manner* as the President of the United States shall from time to time order or instruct;" which provision decides nothing as to what shall be the business of the department.

The act establishing the Department of War in like manner provides, that the Secretary shall "perform and execute such duties as shall from time to time be enjoined upon him by the President of the United States, agreeably to the Constitution, relative to military commissions, or to the land or naval forces, ships, or warlike stores of the United States, or to such other matters respecting military and naval affairs, as the President of the United States shall assign to said department, or relative to the granting of lands to persons entitled thereto for military services rendered to the United States, or relative to Indian affairs; and furthermore that the said principal officer shall conduct the business of said department in such manner as the President of the United States shall, from time to time, order or instruct." Here also the statute power of the President to assign business to the Department, and to direct in it, is limited to a class of enumerated matters and the *manner* of conducting the business assigned.

In the act of 1789, "for the temporary establishment of the Post Office," it is provided "that the Postmaster General shall be subject to the direction of the President of the United States, in performing the duties of his office;" but that act at length expired by its own limitation, and the subsequent acts giving a more stable

form to the Post Office, do not appear to contain any provision as to the directory power of the President. (See acts of February 20, 1792, and March 3d, 1825.)

The act establishing the Department of Treasury, requires the Secretary "to perform all such services relative to the finance as he shall be directed to perform," but makes no reference, *eo nomine*, to the President.

The act establishing the office of Attorney General is wholly silent on this point.

The act establishing the Department of the Navy is precise in terms, to the effect that the Secretary shall "execute such orders as he shall receive from the President of the United States, relative to the procurement of naval stores and materials, and the construction, armament, equipment, and employment of vessels of war, as well as all other matters connected with the naval establishment of the United States. Nothing is said here of any general directory power on the part of the President.

Finally, the act establishing the Department of the Interior is silent on this point.

Now, upon this full exhibition of the statute provisions on the matter, questions arise both as to the substance of the business of the Departments, and the manner of conducting it, in regard to the directory power of the President.

It is impossible for Congress to foresee, and circumstantially provide for, all the possible future contingencies of executive business, either in respect of the business itself or the manner of conducting it. A necessary discretion must exist in the nature of things somewhere as to all such matters. And that ultimate discretion, when the law does not speak, must reside, as to all executive matters, with the President, who has the power to appoint and remove, and whose duty it is to take care that the laws be faithfully executed. Where the laws define what is to be done by a given head of department, and how he is to do it, there the President's discretion stops; but if the law require an executive act to be performed, without saying how or by whom, it must be for him to supply the direction, in virtue of his powers under the Constitution,

he remaining subject always to that, to the analogies of statute, and to the general rules of law and of right. And this view of the question has been followed, uniformly, in the practical administration of the government.

We shall appreciate the value of this conclusion in the sequel, when we come to perceive that great branches of public business are to be found, which are not assigned by statute to any particular department, or as to which there is no provision of statute deciding all questions of the manner of transacting such business.

The Supreme Court have recognized the existence of such a discretion, as being reposed for numerous contingencies, not only in the President in regard to the business of the departments, but in the heads of the departments themselves, by implication of law or as the executive agents of the President. The court say, that to attempt to regulate by law the minute movements of every part of the complicated machinery of administration, would evince complete disregard of the limits of the possible and the impossible. While the great lines of its movements may be marked out, and limitations be thus imposed on the exercise of its powers, there are numberless things to be done which cannot be anticipated or defined, but are, nevertheless, indispensable to the action of the government. These things must of necessity be left to a wise and judicious discretion. (*United States vs. McDaniel*, 7 Peters, 1; *United States vs. Bailey*, 9 Peters, 238.)

Question has existed as to the relation of the President and the respective heads of departments to the chiefs of bureaus, and especially the accounting officers of the Treasury.

It is not the duty of the President, and in general it is not convenient for him, to entertain appeals from the departments on the various matters of business, and especially the private claims, on which they have occasion from time to time to pass. Though he is to take care that the laws be faithfully executed, still it is physically impossible that he should do everything in person. Therefore, the constitution and the laws give to him agents, through whose instrumentality the executive business may be transacted. Among these are the Heads of Departments, and other subordinate officers of the government.

Now, from the fact that the executive agents, primary and secondary, are assigned by law to particular duties, it has been somewhat hastily inferred, that while it is indubitably true that he may direct the heads of departments, yet he has no authority over the chiefs of bureaus, and especially those in the department of Treasury. It needed only to carry this course of thought one step further, to say that the heads of departments themselves had no authority over those officers. This step was taken, and the doctrine it involves was, for a time, asserted. If maintained, it would have been the singular condition of a great government, in which the executive power was vested by constitution in the President, and he had authority over the primary executive officers, but neither he nor they had any authority over the secondary executive officers, and, of course, it would be in the power of the latter to arrest, at any time, all the action of the government.

Such a doctrine was against common sense, which assumes that the superior shall overrule the subordinate, not the latter the former. It was contrary to the settled constitutional theory. That theory, as we shall hereafter see, while it supposes, in all matters not purely ministerial, that executive discretion exists, and that judgment is continually to be exercised, yet requires unity of executive action, and, of course, unity of executive decision ; which, by the inexorable necessity of the nature of things, cannot be obtained by means of a plurality of persons wholly independent of one another, without corporate conjunction, and released from subjection to one determining will ; and the doctrine is contradicted by a series of expositions of the rule of administrative law by successive Attorneys General.

Thus, in a controverted matter of military allowance, requiring an act of decisive judgment, Mr. Berrien adjudged that the Third Auditor and the Second Comptroller are bound to take the decision of the Secretary of War, who may give it either by previous direction or by subsequent review. (Opinion, December 4, 1829.)

Mr. Taney gave similar advice on a question arising in the same department. (Opinion, September 10, 1831.)

Mr. Butler, Mr. Johnson, and Mr. Crittenden have affirmed the same doctrine. And on a question raised by the refusal of the Commissioner of Customs to take the direction of the Secretary of the Treasury, Mr. Crittenden elaborately reviewed the whole subject, and determined, by unanswerable argument, the right of the Secretary of the Treasury in the given case, and by analogy that of other heads of departments in correspondent cases. (Opinion, November 13, 1852.)

Meanwhile, if an opinion delivered many years ago by Mr. Wirt is now to be received as law, then, although an auditor, as even he admits, is subject to the direction of the Secretary of War, or the Secretary of the Interior, or some other Secretary, as the case may be, yet such auditor is wholly above the authority of the President, who, nevertheless directs the Secretary. Had the idea presented itself as a mere question of the *order* of business, to the effect that the President should act upon the subordinate officers through the heads of departments it might have answered as a matter of convenience, but not one of legal necessity. But the idea utterly excludes the authority of the President, and so, while recognizing the authority of the head of department, in effect makes the latter also superior to the President: which is in conflict with universally admitted principles. Such an assumed anomaly of relation, therefore, as this idea supposes, resting upon mere opinion or exposition, must, of course, yield to better reflection, whenever it comes to be a practical question demanding the reconsideration of any Attorney General.

Upon the whole, then, heads of departments have a threefold relation, namely: 1. To the President, whose political or confidential ministers they are, to execute his will, or rather to act in his name and by his constitutional authority, in cases in which the President possesses a constitutional or legal discretion. 2. To the law; for where the law has directed them to perform certain acts, and where the rights of individuals are dependent on those acts, then, in such cases, a head of department is an officer of the law, and amenable to the laws for his conduct. *Marbury vs. Madison*, 1 Cranch, 49-61. And 3. To Congress, in the conditions contemplated by the constitution.

This latter relation, that of the departments to Congress, is one of the great elements of responsibility and legality in their action. They are created by law ; most of their duties are prescribed by law ; Congress may at all times call on them for information or explanation in matters of official duty ; and it may, if it see fit, interpose by legislation concerning them, when required by the interests of the government.

Some further explanation may be necessary, in regard to the relation of the departments to law as represented by the courts of justice. I do not speak now of the responsibilities of a head of department in the relation of crime, whether in questions of indictment or of impeachment. That is a matter of course. I speak of the power of the courts to act on the administrative business of the government.

The constitution in terms vests the legislative power in Congress, the executive power in the President, and the judicial power in the Supreme Court and in such inferior courts as the Congress may, from time to time, ordain and establish. It is perfectly clear that in general, and except at certain points where they necessarily touch one another, such as the participation of the Senate in treaties and appointments, and of the President in acts of legislation, it was intended that the three great departments shall move apart, each in its orbit. *Martin vs. Hunter*, 1 Wheaton, 304, 329. This would not be the case if the courts of law had the power to review and overrule the acts of the Executive. Therefore, on the first great occasion in which the relation of the courts of the United States to the Executive came up for solemn adjudication, that of *Marbury vs. Madison*, which was an attempt of a person to compel the Secretary of State to deliver to him a commission, the Supreme Court, while asserting the responsibility of a head of department to the law, in the general terms hereinbefore cited, and while discussing at length the legality of the act of the Secretary of State in refusing to deliver the commission, and thus voluntarily deciding *arguendo* questions of which they had confessedly no jurisdiction, were compelled, in conclusion, to say this, and to admit that the constitution had not constituted them to be an appellate

tribunal to review and revise the administrative acts of the President of the United States. The Supreme Court thereupon refused a mandamus, the process prayed for in this case, as they did subsequently in the case of *McIntyre vs. Wood*, which was an application for that process to compel the register of a land office to issue a certificate of purchase, 7 Cranch, 504; and in the case of *Decatur vs. Paulding*, where a party sought, by the same means, to compel the Secretary of the Navy to pay a pension to the petitioner, 14 Peters, 497; see also *McClung vs. Silliman*, 6 Wheaton, 349. But the Supreme Court meanwhile had claimed for the courts jurisdiction in the case of *Stokes vs. Kendall*, where parties applied to the court to compel the Postmaster General to make what he conceived to be an illegal payment, and had granted the order on the ground that this was a ministerial act, while the other cases were of executive acts. *Kendall vs. United States*, 12 Peters, 524. It is not easy for a head of department to extract from these cases any very satisfactory rule of conduct, so as to know which, of many acts which he may be called on to perform, is ministerial and not executive. And the court became, apparently, conscious of this, when the later case of *Decatur vs. Paulding* came before them. There they refused to take an appeal from the Secretary of the Navy on a question of alleged legal right to a money payment, after having sustained an appeal from the Postmaster General on the same precise question, that of alleged legal right to a money payment, and proceeded to restate the limitations of the authority of the courts to act by mandamus on the Departments, confining the claim of jurisdiction more precisely to cases in which an act of Congress, lawfully passed, and within the proper powers of Congress, commands a specific act to be done, as, for instance, in the case of *Stokes vs. Kendall*, a definite sum of money to be paid to a party named.

As the law now stands expounded by the Supreme Court, therefore, it is conceded that a head of an executive department of government, in the administration of the various and important concerns of his office, is continually required to exercise judgment and discretion. He must do this in construing the acts of Congress, under which he is from time to time required to act. If he doubts,

he has a right to call on the Attorney General for counsel. In general, his duties are not merely ministerial. The Supreme Court will not entertain an appeal from his decision, nor revise his judgment, in any case where the law authorized him to exercise discretion or judgment. Nor can it, by mandamus, act directly upon the officer, and guide his judgment or discretion in the matter committed to his care in the ordinary discharge of his official duties. Any such interference would involve a confusion of constitutional powers, and produce nothing but mischief in the business of the government.

The organization of the executive departments of administration implies order, correspondence, and combination of parts, classification of duties, in a word, system: otherwise there is waste and loss of power, or conflict of power, either of which is contrary to the public service, in the regard of so much work to be done by such and such persons, and at a given cost of either time or money. Besides which, in a political relation, want of due arrangement of public functionaries and their functions, is want of due responsibility to society and to law.

Accordingly, it has been the general purpose of Congress, at all times, both as to the great subdivision of departments, and the arrangement of the duties of each, to classify and to systematize.

This was an exigency of wise public policy, even when the business of the government was little, and the number of its officers comparatively small; and it was, even then, accomplished approximately. But now,—when the territorial limits of the Union have spread from the Atlantic to the Pacific Ocean,—when the vast interests of the people of the Union are co-extensive with the habitable globe,—when the progress of wealth, intelligence, and mechanical invention has wonderfully enlarged and complicated the interests of society,—when our commerce extends to every land, and our ships are abroad on every sea,—when the American Union has become a primary power in Christendom,—and when the number of persons requisite to work this mighty machine of government has been proportionally augmented,—in such a state of things, that exigency of order, which was political wisdom always, has now come to be material necessity.

At such a period of the history of the Government, it seems fitting to consider where, if at all, in the conduct of its business, its mechanism can be saved from waste or collision, and its agents subjected to more complete and exact responsibility. And on these premises it is that the present suggestions are made as to the conduct of the law business of the government.

According to the obvious theory of the constitution of the office of Attorney General, he has the superior charge of that business. And this theory is carried into practice in the main outlines of the duty of his office, as the following analysis will show.

1. Upon the great questions of law arising in the administration of public affairs, he gives opinions officially, both to the President and to the heads of departments.

2. As one of the confidential political counsellors of the President, it may be supposed that he advises more particularly in regard to the legal incidents of the appointments or other acts of the government.

3. He conducts directly all suits in the Supreme Court in which the United States are concerned.

4. He advises or directs the Solicitor as to suits in which the United States are concerned, pending in the inferior courts of the United States.

5. He directs and prosecutes appeals in the great questions of land-title, which involve the proprietorship of all the soil in the successive increments of territory acquired by the United States.

6. He performs occasional duty, from time to time, in the protection of the interests of the United States in matters of adjudication under treaties with foreign powers.

7. He passes upon the title of all interest in lands acquired by the United States, by purchase, for any of the local uses of government.

8. He communicates to Congress such information as they require, appertaining to the duties and business of his department.

In all these particulars he is, either directly or indirectly, and by statute either express or implied, the administrative head, under the President, of the legal business of the government. So far

the administrative power, and the correspondent administrative responsibility exist, and they require modification in details only in order to be completely adapted to the theory of departmental organization.

Among these modifications, it is respectfully submitted, should be provision, either by law or regulation, for a periodical report by the Attorney General to the President, and through him to Congress, of the business of his office, including the official opinions given by him, and any pertinent suggestions regarding the interests of the Government.

Then come three important branches of public business, which the President is required, either by the constitution or laws, to discharge in person or through lawful agents, as to which there is no specific provision by Congress, namely :

1. Suits in which the United States are ultimately concerned, but in which they are not a party of record, or which are not brought in the courts of the United States.

Thus it is that suits, on a foreign alleged grant, against a tenant in possession under patent from the United States, who will be called on to indemnify the tenant if he be evicted, are brought from time to time in the States ; but no provision exists for protecting the eventual interests of the United States in such cases by notice to the government ; there may be collusion in the suit in the court below, or mismanagement ; and even if the case come up to the Supreme Court, it may become known to the Attorney General by accident only, if at all.

Or, suit may be brought by some individual against an officer of the United States for some official act performed by him, and judgment rendered against him for heavy damages, perhaps without due defence, but for which Congress will be required to make indemnity.

Or a suit is brought by some person, or by a State, against an officer of the United States in the alleged possession of a citadel as its commander, or of a custom-house as collector of the revenue, for the purpose of thus obtaining a judgment of ejectment, which, in fact, evicts the United States.

Or conflicts of jurisdiction may arise in the States, involving the whole question of the execution of the laws of the United States, or the domestic or foreign peace of the Union, without the United States being in any sense a party, but in which the political interests of the government are as such above all possible estimation.

These are cases of daily occurrence, and subsisting examples of which, in various forms, do now occupy the attention of the Executive; but the legal controversies thus arising have to be conducted by this or that head of department in whose branch of service they may happen respectively to arise, without any adequate and proper provision for their conduct.

The President undoubtedly has power to assign all these cases, as they arise, to the charge of the Attorney General; and it would be fitting that he should do so; providing that the correspondent changes in the organization of this office be authorized by Congress.

2. Pardons. Applications are, of course, continually made to the President for the exercise of his constitutional power to grant reprieves and pardons for offences against the United States. Being constitutional, it is a power which Congress cannot take away or impair. It might, however, as it has done in other cases where needed, provide legal means and legal agents to aid the President in its exercise; in the absence of which he must of necessity exercise a lawful discretion in those respects. The conscientious determination of questions of this class requires, generally, the investigation of proceedings in court, and that of questions of law as well as of evidence, and the conduct of correspondence, in all which the President requires the instrumentality of a public officer. Formerly, this duty was performed by the Secretary of State; of late, it has been assigned to the Attorney General, in whose department, by reason of the nature of the business, it appropriately falls.

3. Commissions of public officers of a judicial character or relation.

No provision of law exists prescribing the department which shall receive the applications and recommendations, conduct the correspondence, and analyze or abstract the documents, in this branch of public service. Formerly, it was done by the Secretary of State;

but it has no natural connection with the general duties of his office, and it has been assigned to the Attorney General as a more appropriate agent.

There is need of legislation in this respect to give method and convenience to the public business. When the commencement of organization took place in 1789, it was provided that all civil commissions should issue from the Department of State, and all military (including naval) ones from the Department of War. Thirty years afterwards, it was provided that all commissions of officers, employed in levying and collecting the public revenue, shall be made out and recorded at the Treasury Department, and sealed with its seal. As the duties of administration continued to increase, it was found convenient to give an official seal to other departments, and to make it evidence in law; but no correspondent provision of law was enacted relative to the issue of civil commissions, which remained on the footing of the acts as to the Departments of State and Treasury. A systematic arrangement of things would require, that, as in the Departments of State, Treasury, War, Navy, so in those of the Postmaster General, Interior, and Attorney General, commissions should be sealed, issued, and recorded in the office to which they belong.

One remaining branch of public service is to be considered, in order to dispose of this part of the subject, namely, supervision of the accounts of judicial and legal officers of the government.

When the Home Department was established, the supervisory power previously exercised by the Secretary of the Treasury over the accounts of marshals, clerks, and other officers of the courts of the United States was transferred to the Secretary of the Interior. In this no special fitness appears. The Secretary of the Interior does not superintend the appointment of those officers; he has no power by statute to correspond with or direct them; and in several successive reports to Congress from that department, it has been recommended that the accounts of judicial officers, in common with their appointment, be transferred to the Attorney General.

Finally, if any of these proposed changes be adopted, or whether they be so or not, it is desirable that there should be some provision

for the case of temporary vacancy in the office of Attorney General. By two acts, one of 1792, and another of 1795, provision is made that, in case of the absence from the seat of government or sickness of the Secretary of State, the Secretary of the Treasury, or the Secretary of War, or the death of either, or the temporary vacancy of either office, for not exceeding six months, it shall be lawful for the President to authorize any person, at his discretion, to perform the duties of such office until a successor be appointed, or until such absence or inability by sickness shall cease. (May 8th, 1792, and February 13th, 1795.) There is also an enactment by which, in case of the death, resignation, or absence of the Postmaster General, all his powers and duties shall devolve, for the time being, on the First Assistant Postmaster General, (July 2d, 1836.) No general provision exists for a temporary appointment by the President, either in regard to this, or to the Departments of the Navy, Interior, and Attorney General. The existing legislation leads to opposite and contradictory conclusions. It may be said, on the one hand, that the power expressly conferred on the President in three of the Departments, may be applied by analogy to the others. On the other hand, it may be said that the express enactment conferring the power on the President in those three cases, and making special peculiar legal provision in regard to a fourth, is the implied exclusion of any power of the President as to the remaining three. Perhaps the truer view of the question is to consider the two statutes as declaratory only, and to assume that the power to make such temporary appointment is a constitutional one. It has been exercised in regard to all the departments. In the most questionable of the cases, that of Attorney General, whose quasi-judicial functions especially would seem to require to stand on legislative authority, proof exists in the files of the department that temporary appointment has been made by the President, as in the case of the departments whose heads are more exclusively executive officers. But a general provision is desirable to remove all doubt on the subject, as well respecting the Attorney General as the other non-enumerated departments.

I submit the propriety, therefore, of some further provision of

law as to the arrangement of the legal affairs of the government. The proposed changes do not enlarge the present power of the Executive in any respect. But they devolve additional labor on this office by transfer from others: on which account, I beg leave to add a few words of personal explanation.

When the office of Attorney General was created, and for long afterwards, inequality existed between his salary and that of other officers of the same class. The reason why he received less than the others is given by Washington in his letter to Mr. Edmund Randolph, tendering to him the first appointment of Attorney General, in which he says: "The salary of this office appears to have been fixed at what it is from a belief that the station would confer pre-eminence on its possessor, and procure for him a decided preference of professional employment." On this basis things continued until a very late period, the Attorney General receiving less salary than his associates, but being invited, as it were, by the nature of the office, into private professional practice in the courts, for which his near association with the government, united to the professional qualification, which, from his being appointed to the office, he may be assumed to possess, would serve to give him great advantages. The public correspondence of the eminent statesmen of the first and second generations of our constitutional history, the reports of legal adjudications, the printed opinions of this office, and the documents on file in it, show that it was the received practice of the Attorney General not only to give opinions in private cases, and argue private causes at the seat of government, but also to attend, as a practising barrister, at the sittings of courts in the States.

The office of Attorney General of the United States has been filled, in past times, by men, who, while eminent in their special profession, have been not less eminent in the career of parliamentary, diplomatic, administrative, or judicial distinction; and many of whom now live, enjoying, by just title, the respect and the confidence of their countrymen. At the bar of the Supreme Court they did honor to their station; and their official opinions are the law which guides the action of the government. Nothing could be more foreign to my purpose than to reflect in what follows, upon any of

those distinguished persons for pursuing a course in office which was not forbidden, but, on the contrary, invited by law, and was justified by official usage, and by the approbation or acquiescence of Washington, Adams, Jefferson, and Madison.

Heretofore, the custom of the Attorney General in this respect, did not essentially interfere with his proper official duties, nor prejudicially affect his general relation to the government.

Within the last few years, however, the condition of the country has undergone changes, occasioning a vast augmentation in the amount of administrative business, which heads of department are called upon to perform ; and it would not be possible now, as it has heretofore, for the Attorney General, compatibly with performing well the duties of his office, to be frequently absent from the seat of government, attending to private professional pursuits, nor could he find much leisure to prepare and argue private causes even before the Supreme Court.

It may deserve consideration, whether Congress, in establishing quite recently a common rate of salary for the Attorney General and the other heads of departments, did not have in mind the new state of facts above referred to, and for that cause intend to repeal, by implication, the previous implication of law, which prompted a continuance of the private professional pursuits of the Attorney General.

There is one other pertinent consideration. Most of the ordinary doctrines of law, and much of what is political organization, we have derived from the institutions of our mother country. The original theory of the office of Attorney General of the United States, which authorized and prompted him to engage in private professional practice, flowed, perhaps unconsciously, in part from the correspondent usage in Great Britain. But there the Attorney General is not a member of the cabinet, the Lord Chancellor performing the political duties which devolve upon the Attorney General here. And there is reason to doubt whether, at the present day, in the United States, it is expedient that a head of department should, under any circumstances, continue in the practice of law as a profession. Whatever change in the amount of public business

the greatness and wealth of the country may have produced, they have produced a still greater change in the multitude and the urgency of the private interests which assail the government. No person who has been conversant with public affairs here for the last twenty years can fail, on comparing the state of things at the beginning and at the end of that period, to see how striking is the transition in this respect. Formerly, in an age of simpler manners, when the public expenditures were less, the number of places less, the population of the country less, the frequentation of the capital less, the ingenuity of self-interest less,—at such a time a secretary, eminent in the legal profession, might, without the possibility of reproach or suspicion of evil, take charge of private suits or interests at the seat of government. He may do so now, perhaps; but that is not so clear as it formerly was; and it is not easy to perceive any distinction in this between what befits one and another head of department. Nay, arguments of objection could be suggested, especially applicable in the existing state of society, to the Attorney General.

However all these things may be, the actual incumbent of this office, in the magnitude and complication of the public interests with which it is now charged, experiences that its necessary duties are quite sufficient to task to the utmost all the faculties of one man: and he willingly regards those recent acts of Congress, which have at length placed the salary of his office on equal footing with other public offices of the same class, as intimation at least that the government has the same precise claim on his services, in time and degree, as on those of the Secretary of State or the Secretary of the Treasury. As the corollary of that principle, he now proposes such modifications in the office as may render it really and effectually, as well as in theory, responsible for the law business of the government.

The same thing in substance was earnestly proposed by Jackson in his first annual message to Congress, (December 8, 1829,) and has been twice recommended to Congress by later Presidents. Whatever reasons of public utility seemed then to require change in this respect, have, in the progress of time, acquired such additional

force as to lead me to conviction of the propriety of presenting the subject to your notice, and with your approbation, to the notice of Congress.

I have the honor to be, very respectfully, your obedient servant,
C. CUSHING.

The PRESIDENT.

NEUTRALS' TITLE TO SHIPS OF BELLIGERENTS.

OPINION OF ATTORNEY GENERAL CUSHING.

ATTORNEY GENERAL'S OFFICE.
8th October, 1855. }

SIR:—Your letter of the 6th instant, communicating a letter of the Secretary of State, which gives information that “this government will feel bound to maintain the right of citizens of the United States to purchase vessels belonging to subjects of any of the parties to the war, in every case where the purchase shall have been made in good faith, and the property shall have been delivered,” and also a letter from the Collector of the port of Boston, inquiring what document shall be given to any such vessel, to authenticate her title to protection as the property of a citizen of the United States,—has been duly considered.

I beg leave to refer, in the first place, to the accompanying opinion on the general question, prepared on the 7th of August, 1854, at the call of the Secretary of State. See Law Register, August, 1855.

In addition to what appears in that paper, permit me to say, that subsequent reflection has but served to confirm the conclusions therein expressed.

Since that opinion was delivered, several treatises, of more or less value, on belligerent law have been published in Great Britain, adapted to current events, and to the present state of the science of jurisprudence. They agree unanimously, that the *bona fide* sale of the ships of belligerents to neutrals in time of war, is lawful and valid, unless made *in transitu* (Hosack, Rights of British and Neutral Commerce, p. 81; Loch, Legal Guide of Sailors and Merchants during War, p. 129; Wildman, Law of Search, Capture and Prize, p. 26; Hazlitt, Maritime Warfare, p. 208.

A still more important fact in this relation is the decision of the British High Court of Admiralty in a late case of a vessel captured as Russian, but claimed as the property of a Hamburger, by purchase since the commencement of hostilities. In this case the court (Dr. Lushington) says, "With regard to the legality of the sale, assuming it to be *bona fide*, it is not denied that it is competent to neutrals to purchase the property of enemies in another country, *whether consisting of ships or anything else. They have a perfect right to do so, and NO BELLIGERENT RIGHT CAN OVERRIDE IT.* The present inquiry, therefore, is limited to whether there has been a *bona fide* transfer or not." (The *Johanna Emilia*, English Reports in Law and Equity, vol. xxix, p. 562.)

Thus it is perceived that now, in Great Britain, not only is it held that neutrals have right to purchase belligerent vessels by the law of that country, but also by the law of nations; that the right is "perfect," and that "no belligerent right can override it."

I am not aware of any assumed belligerent right adverse to this, except in a French regulation of the reign of Louis XVI., as follows :

"Regulation of July 26th, 1778, Article 7 :—Ships of enemy's construction, or which shall have been of enemy's ownership, cannot be regarded as neutral, or as belonging to allies, unless there be found on board certain documents, authenticated by public officers, certifying the date of sale or cession, and that such sale or cession had been made to the subject of an allied or neutral power previous to the commencement of hostilities, and that the said conveyance of an enemy's property to the subject of a neutral or an ally, has been duly registered in presence of the principal officer of the place from which the vessel sailed, and signed by the owner of the ship, or by person holding power of attorney from him. (Lebeau, *Nouveau Code des Prises*, tome ii., p. 342.)

This regulation is defended and commended in a recent French treatise on prize law, with singular inconsistency, considering the just pride which the authors express in view of the cotemporary success of the French and American doctrine of neutral rights in the matter of the immunity of merchandise on board of neutral ships

of commerce. (*Pistoye et Duverdy, Traité des Prises maritimes*, tome i., p. 350 ; tome ii., p. 1.)

It is remarkable, also, while they carefully expose the difference between the English and the French public law in the first case, yet they as carefully suppress all indication of that difference in the second case, although they quote several recent prize trials in the British Court of Admiralty, which involve inquiry on collateral relations of the same great question, and the due understanding of which in France required that the English rule should be stated, at least by way of commentary, if not of approbation. (Tome ii., p. 15.)

It is remarkable for the further reason that other French authors of deserved authority had pointedly condemned the regulation of Louis XVI. (See *Hautefeuille, Droits et Devoirs des Neutres*, tome iv.)

Rumor asserts that the regulation has been applied, during the present war, to the case of a Russian merchantman purchased by a Spaniard in the port of Cadiz.

But, considering the liberal character of the traditional public policy of France in the matter of neutral rights,—a policy, which, it is apparent in other respects, has the enlightened approval of the present Emperor of the French,—it is not to be presumed that the French Government will assert this regulation, adversely to the public law recognized not by neutrals merely like the United States, but by one of the two principal co-belligerents, Great Britain. We may rather anticipate that the Emperor, justly gratified to see England come up to the policy of France, in regard to neutral transportation of belligerent goods, will not choose to remain behind England in regard to the purchase and sale of belligerent ships.

It remains only to speak of the form of authentication to be conceded to belligerent ships purchased by citizens of the United States.

The act of Congress of March 26th, 1810, forbids the issue, by the United States of a “sea letter or other document certifying or proving” the ownership of such vessel. (2 Stat. at Large, p. 568.)

A certificate, in the precise form indicated by your letter, might contravene the provisions of the statute.

But such a certificate is not necessary, nor indeed, would it be the best document, of itself alone, to protect the property in a foreign prize court.

The English rule is well stated by Wildman, a reliable authority. He says:—

“The title of a neutral vendee to a merchant vessel sold by the enemy in time of war is valid, where the property is *bona fide* and absolutely transferred so as to divest the enemy of all future interest in it. * * The court looks singly to the bill of sale as a document, which is recognized by the law of nations; and the *ownership must be decided by it.*” (Ubi supra, p. 26.)

The French regulation is to the same effect, making the requisite proof to be a bill of sale, duly recorded by the principal officer of the port of departure. (Pistoye et Duverdy, tome ii., ch. 2, § 4.)

I think these authorities and the reason and analogies of the thing, indicate the proper course to be pursued here.

The Collector, or the Register of the Treasury, can lawfully receive and make a record of the bill of sale. He can lawfully authenticate the validity, in form and in substance, of the bill of sale. He can lawfully deliver to the owner a document certifying these facts, but without certifying the fact of ownership. This last fact is the legal consequence of the preceding facts. He can also certify that the owner is a citizen of the United States. And from the series of facts thus authenticated, will ensue the general consequence that the ship, supposing the transfer to have been *bona fide*, is entitled to protection as the lawful property of a citizen of the United States.

In fine, it is *authentication* of the bill of sale and of citizenship, which seems to be requisite from the United States, while the essence of the transaction, as between the belligerent and the neutral, is its *bona fides*, of which the documents are *prima facie* proof, subject to such investigation as the rules of evidence justify, which rules are in substance the same in the prize courts of Europe and America.

I have the honor to be, very respectfully,

C. CUSHING.

Hon. JAMES GUTHRIE, *Secretary of the Treasury.*

RECENT AMERICAN DECISIONS.

*Superior Court of Cincinnati.*JOHN REA, PLAINTIFF IN ERROR vs. NATHANIEL SMITH ET AL.¹

1. A public officer, whose duty it is to arrest all persons charged with or suspected of the commission of crime, cannot claim any other or further remuneration for his services, than the fees allowed by law.
2. Whenever an officer makes an arrest, he is supposed to be acting in his official capacity; and where he performs the duty of sheriff, believing he was acting within the authority derived from law, the court will not allow him to change the relation and assume that of a private individual.
3. A sheriff, or any other ministerial officer, may arrest fugitives from the justice of any other State of the Union, and detain them for a reasonable time, until the requisition of the Executive can be made.
4. A reward offered may be apportioned, upon equitable principles, among several parties, as the court may direct.

James McMannus filed his petition at special term, against Nathaniel Smith, James Gardiner, and Darius C. Ingalls, claiming the benefit of a reward offered for the apprehension and conviction of the murderers of Alexander Gardiner and James Miller, who were found dead and mangled in the Ohio river, near Troy, Indiana. The offer of the reward was published in the Cincinnati Gazette and Louisville Journal, and is as follows: “\$500 *Reward*. We will pay the above reward for the arrest and conviction of the murderer or murderers of Messrs. Miller and Gardiner. The murders were committed on their trading boat, near Troy, Indiana. Two of the crew are missing, and they are suspected of being the perpetrators. One of them has sandy hair, is rather delicate, about eighteen years of age, and five feet ten inches high. The other is low set, stout built, with large black whiskers, and about twenty-five years of age.” Signed, “Smith & Graham; payable at the house of Smith & Graham.”

It is alleged that the following December, the plaintiff gave information to officers connected with the police of the city of St.

¹ We are indebted to the learned reporters, Messrs. Handy, for this case, which will be found in 2 Handy Rep. 193, now in process of publication.—*Eds. Am. L. R.*

Louis, which led to the arrest of Moses Kelly, one of the supposed criminals, who was in consequence taken to Hancock county, Kentucky, where he was tried, convicted, and executed for the murder. The other defendant, Ingalls, who was made a party to the action, it is averred, demanded a portion of the reward, for his pretended services for assisting in the arrest of the other fugitive, Robert Kelly, in Ripley county, Indiana. While the controversy was pending, J. E. O. Cozzens, who apprehended Moses Kelly in St. Louis, and the plaintiff in error Rea, who actually arrested Robert Kelly, were also made defendants. The case was submitted to Judge Storer, at special term, who heard the evidence adduced by the parties, and held that neither McMannus, Cozzens, Ingalls, or Rea, were entitled to receive any portion of the reward offered by the defendants, Smith and Gardiner. The plaintiff Rea excepted to the ruling of the court, and moved for a new trial, on the ground that the decision was against the law and the evidence, &c. This motion was overruled; to which the plaintiff also excepted, and now files his petition to reverse the judgment of the court. As the other claimants have not joined the plaintiff in this action, it is not necessary to refer to the evidence upon which they founded their claim. It was proved on the trial, to sustain the claim of the present plaintiff, that he was the sheriff of Ripley county, Indiana, when he arrested Robert Kelly, that a warrant was then in his hands, and that he called upon several persons to aid him. After the criminal was apprehended, he was held in the sheriff's custody for several days, brought in the meanwhile before an examining court, and finally taken by the same sheriff to Hancock county, Kentucky, where the culprit was tried, convicted, and executed.

The opinion of the court was delivered by

STORER, J.—The plaintiff in error has assigned several causes for the reversal of the judgment rendered in special term; but it seems to us, the only question in the record proper for us to decide is this:

Can a public officer, whose duty it is to arrest all persons charged with or suspected of the commission of crime, claim any other or further remuneration for his services, than the fees allowed by law?

It was in evidence on the trial, as it appears by the bill of excep-

tions, that the plaintiff in error was acting as sheriff, and had a warrant in his possession when he arrested the criminal. After his apprehension, the murderer was brought before an examining court, being then in the sheriff's custody, and there detained, until he was removed to the place of trial in Kentucky, on the requisition of the governor of that State.

We must regard, then, the arrest to have been made by a public officer, who supposed and believed he was in the proper discharge of his duty.

The law of Indiana forbids a sheriff, or other ministerial officer, to receive greater fees than those it allows for the ordinary discharge of their duties, and is similar in its terms to our own statute on the same subject. Both are enacted to prevent oppression and extortion by those who are bound to execute legal process. They but affirm the common law, which declared all contracts entered into upon any such consideration of no validity, and permitted the person who had paid any such extra compensation to an officer, to recover it back.

The leading case on this point is that of *Bridge vs. Cage*, Cro. Jac. 103. A sheriff brought his action to recover £60 upon an agreement, that if he executed a writ of elegit, he should receive that sum, in addition to his legal fees, and the court held he could not recover. The same rule is held in *Hobart*, 18 d.; *Norton vs. Simmes*, Sir William Jones' Rep. 65; *Badow vs. Salter*, S. C. Latch. Rep. 54. In *Stotesbury vs. Smith*, Burrows, 924, the question was again discussed. A *capias* was in the hands of the sheriff, who "agreed to receive *Stotesbury* as bail, on the assurance he should be paid six guineas for so doing. The bail was taken, but the sum promised was not paid to the sheriff, who now claimed to recover it, but the court would not aid him. The judges gave their opinions *seriatim*, and it may not be unprofitable to quote them briefly. Lord Mansfield said: "It is oppression to take money for doing what the officer ought to do, even though it be the mere using his discretion." Justice Dennison held "that he had never seen such a demand stated in a court of justice: the officer would have been liable to attachment for this fact, if he had been complained

of for it." Justice Foster said: "It would be a great inlet to oppression, if such a consideration could be established as legal;" and Justice Wilmot, whose opinion concluded the case, said "he thought this a most shameful and scandalous action." This case is again reported by Sir William Blackstone in 1 Black. Rep. 204, who well observes, the court rendered this judgment with much indignation upon the facts. Whether the same honest rebuke has been since applied, or whether a necessity has existed for its expression, it is not our province to inquire.

It is well said in 1 Hawkins' P. C. 68, pl. 4, "that if it should be once allowed such promises could sustain an action, the people would be quickly given to understand how kindly they would be taken care of, and happy would that man be, who could have his business well done without them."

So far has the principle been since carried in England, that Lord Ellenborough, following the case of *Harris vs. Watson*, Peake Cas. 72, held in *Stylk vs. Myrick*, 2 Camp. 317, "that a seaman to whom extra wages had been promised when the ship was in distress, could not recover them, as he was bound by the nature and terms of his contract to do his duty at all times, to the extent of his ability."

A similar doctrine is affirmed in *Lane vs. Surell*, 1 Chitty Rep. 175; *Dow vs. Harsons*, ib. 295, and *Woodgale vs. Knatchbull*, 2 T. R. 148.

The Court of Errors of New York, in *Hatch vs. Mann*, 15 Wendell, 50, fully adopt the English decisions, holding that a constable could not recover a larger compensation than the statute allowed, for serving process, and that a contract to pay him any such sum could not be sustained.

In *Pool vs. The City of Boston*, 5 Cushing, 219, the Supreme Court of Massachusetts decided that a watchman, whose duty it was to arrest criminals, could not claim a reward offered by the government, for the arrest and conviction of an incendiary.

The Supreme Court of Pennsylvania, in *Smith vs. Whildin*, 10 Barr, 39, held that a ministerial officer, who was bound to execute criminal process, could not claim a reward offered for the apprehension of a criminal. Judge Coulter in deciding the case, remarks:

"It would open a door to profligacy, chicanery, and corruption, if the officers appointed to carry out the criminal law were permitted to stipulate by private contract; it would open a door to the escape of offenders by culpable supineness and indifference on the part of those officers, and compel the injured persons to take upon themselves the burden of public prosecution." The Supreme Court of Tennessee, in *Stamper vs. Temple et al.*, 6 Humphreys, 113, affirm the same doctrine.

Our own Supreme Court, in *Gilmore vs. Lewis*, 12 Ohio, 281, have authoritatively settled the question, and we would have been content to have referred only to the well considered opinion of Judge Wood, without any other examination of the law, did we not feel it to be our duty—when the obligations of ministerial officers, we fear, are not always clearly understood, and in many cases are but slightly regarded—to re-affirm what we believe to be sound law and equally sound morality, and thus vindicate the principles by which official conduct should be regulated, and oppression, under color of law, redressed.

It is contended, however, that the plaintiff in error, though holding the office of sheriff when he made the arrest, acted as a private person; that it was not his duty to apprehend a fugitive from the justice of another State, and cannot therefore be subjected to the rule we have indicated.

On referring to the Revised Statutes of Indiana, vol. 2nd, pp. 10–11, we find the sheriff is declared to be "a conservator of the peace, and is bound to execute all process directed to him by legal authority, and pursue and commit to the jail of the county all felons." The power thus conferred is certainly broad enough to authorize the apprehension of murderers or felons, whether the offence was committed in Indiana or Kentucky; and it is difficult for us to perceive how the duty could be denied by the officer in every proper case, whether the accused person was a fugitive, or a domestic felon. An admission of the contrary doctrine would change the character of the sheriff from that of a high public functionary, to whom the largest powers have been confided for the preservation of the public peace and the protection of private right, to the passive

condition of an agent, acting only as he may be directed by the magistrate or the court. We cannot so regard the question. Whenever an officer has made an arrest, he is presumed to have acted in his official character; and where, as in the present case, he performs the duty of a sheriff, believing he was acting within the authority he derived from the law, we cannot permit him to change his relation as an officer, and assume that of a private individual. He might well have arrested without a warrant upon probable cause of suspicion, if the necessity of the case required it, and he would have been protected if the accused should afterwards have been discharged. *Samuel vs. Payne*, Douglass, 359; *Hobbs vs. Branscombe and others*, 3 Campbell, 420; *Holly vs. Mix*, 1 Chitty's Crim. Law, 15, 3 Wendell, 353; Gwynne on Sheriffs, 523.

The precise question argued by the plaintiff in error was very fully examined by McCoun, V. C., in *City Bank vs. Banks and others*, 2 Edw. Ch. Rep. 95. In that case the bank was robbed of a very large sum of money, and a reward of \$10,000 offered for the detection of the criminals. The property lost was recovered, and a bill was filed by the bank to settle the rights of many claimants of the reward, among whom was the celebrated high constable Hayes. To avoid the operation of the principle, Hayes, who made the arrest without warrant, and found the money in the burglar's trunk, urged that he acted as a private person throughout the matter; no official duty being imposed upon him by any process. But the court held he was bound to arrest the criminal upon probable cause of suspicion, and having assumed to act, apprehended the culprit, and found the property upon search, he would not be permitted to deny his official character. He could not change the legal relation he sustained. He was asked to arrest a criminal by those who had good ground to suspect his guilt, on the supposition that he had the power to do so; he consented to discharge the duty, and having undertaken to perform it, he must abide by his official character.

We think the reasoning of this case disposes of the last objection made by the plaintiff, and fully authorizes us to decide what we should otherwise have decided upon general principles, that the

judge at special term committed no error in holding that there could have been no recovery for the present plaintiff.

It may be proper for us further to hold, that a sheriff, or any other ministerial officer, may arrest fugitives from the justice of any other State of the Union, and detain them for a reasonable time, until the requisition of the executive can be issued. We see no objection to such a course, and it is in harmony with the decisions of the tribunals of other States.

In R. M. Charlton's Reports, the Superior Court of Georgia held, that "one charged with felony in one State, and fleeing to another, may be arrested or detained until an opportunity is afforded to the proper authority to demand the prisoner."

In 4 Harrington, 572, the Supreme Court of Delaware decided, "that a judge or justice of the peace could order the arrest of a fugitive from justice before demand."

The same power is affirmed by Ch. Jus. Tilghman in *Respub. vs. Deacon*, 10 S. & R. 10, and again asserted in *Respub. vs. Wilson et al.*, 7 Law Intelligencer, 148.

In Ohio the same practice prevailed, even before the passage of the statute which now gives express power to magistrates to issue warrants, and ministerial officers to apprehend the fugitives.

It is not to be doubted that, in every proper case, a recovery may be had for a reward thus offered, by any person who gives the information by which the arrest is made, and the criminal punished. The proposal or offer to pay for the services, when accepted, creates a liability which the courts will enforce. The English cases on the subject are collected in a note to Chitty on Contracts, p. 559, ed. of 1855. See also *Wentworth vs. Day*, 3 Metcalf, 352; *Loring vs. Borton*, 7 do 441; *Gilmore vs. Lewis*, 12 Ohio, 281.

We supposed the reward offered may be apportioned upon equitable principles, in a proper case, among several parties, as the court may direct. It is so held in *Symmes vs. Frazier*, 6 Mass. 344, and in 2 Edw. Ch. 95, already quoted.

Whether the sheriff in this case, if there had been no legal objection to his claim, could have brought himself within the terms of the offer, we need not decide. It appears by his answer, that for seve-

ral days before the arrest, the criminal had been generally suspected, and was believed to be guilty, and that it was upon such information the party was apprehended. Nor is it now proper for us to say, whether the evidence established any knowledge, on the part of the officer, of the existence of the proposed reward, when the felon was taken into custody.

Without further reference to adjudged cases, we are satisfied to place our decision on the broad ground, that no officer of the law, who is sworn to perform his duties, and bound to perform them to the full measure of his ability, shall be permitted to violate the law; that the only safe ground for the officer to occupy is to receive no other compensation for his services than the statute allows; and on no other can he faithfully and impartially discharge his official obligations.

If it should be admitted, that the degree of vigilance is to be measured by the amount of extra compensation proffered or paid, and those upon whom is imposed the service of legal process are to be urged to duty by the promise of other reward than the fees allowed by law, the administration of justice will no longer be maintained in its certainty or its purity. He only may then rely upon the fulfilment of official duty, who has the ability to pay the largest equivalent, or the least scruple to propose it.

The judgment of the court in special term is affirmed.

Spooner & Brower, for plaintiff.

James & Jackson, for defendant.

In the Circuit Court of the United States for the Districts of California.—In Equity.

JAMES TOBIN ET AL. vs. ROBERT WALKINSHAW ET AL.

1. On a motion for an injunction new matter set up by way of avoidance in the answer responsive to the bill, is to be deemed evidence in favor of the defendant, as his sworn statement.
2. The fixed rule in equity, is, that where the rights of a person not before the court will be affected by the decree asked, the court will not make it; but the general rule is to be applied to each case as it arises, by the aid of precedent cases.

MCALLISTER, J.—Among the numerous questions which have been submitted during the argument of this motion, there is one which arrests attention *in limine*, and, in the view I have taken of the case, will preclude a decision on any other. That question is one of jurisdiction. In advance of any discussion on this point, I desire to advert to a question which was argued incidentally by the solicitors for the respective parties. I allude to the question—“How far is matter of avoidance in answer to be treated as evidence by the court?” An examination of the authorities has conducted me to the conclusion that the rule is, that upon the hearing, after the answer is put in issue, new matter, set up by way of avoidance, must be proved by defendant; but that on a motion for or on a motion to dissolve an injunction, such new matter, in the answer responsive to the bill, is to be deemed evidence in favor of defendant as his affidavit or sworn statement. As this opinion is necessarily very extended on what I deem the principal point in the decision of this motion, my reasons for the conclusion to which I have come in relation to the question of new matter in the answer, will be reserved for some future case or occasion.

In regard to the want of parties in this case, which gives rise to the question of jurisdiction, it has been urged by complainants, that

it is too late for defendants to object a want of parties, and that this was matter only for plea in abatement.

Now a plea for want of parties is not matter for abatement. It is a plea in bar, and goes to the whole bill as well to the discovery as to the relief prayed. 1 Daniell Ch. p. 337. Again, the rule is, that if want of parties is apparent on the face of the bill, the defect may be taken advantage of by demurrer. If such defect be vital, it may be insisted on at the hearing, and if the court proceed to a decree, such decree may be reversed. If the defect is not apparent on the bill, it may be propounded by way of plea, or it may be relied on in a general answer. (Story's Pl. § 236.)

In *Eppes vs. Van Deusen*, 4 Paige, 75, it is said, defendant is not bound to demur or plead. He may make the objection in his answer, and may have the same benefit of the objection at the hearing as if it had been taken by plea or answer.

The thirty-ninth rule of equity expressly gives the right to defendant to avail himself in his answer of anything which would be good in the form of a plea in bar, and the fifty-second rule provides, that where defendant by his answer suggests the want of parties, plaintiff shall be set at liberty, within fourteen days after answer filed, to set down the cause for argument upon that objection alone. These rules evidently authorize a party to avail himself of a defect for want of parties as effectually in his answer as by plea in bar.

Had defendants availed themselves of the right to plead in bar, much time and discussion would have been saved. But they have the right to bring forward their objection in the form of an answer. Having done so, I am called on to decide if there are such parties before the court which will authorize it to adjudicate upon this cause, whether this court be deemed a court of general equity jurisprudence, or whether the peculiar structure of the limited jurisdiction of this court under the constitution and laws of the United States, be considered.

In *Cameron vs. Roberts*, 3 Wheaton, 591, where the citizenship of the defendants other than Cameron did not appear on the record, the Supreme Court of the United States certified—"If a joint interest vested in Cameron and the other defendants, the court had

no jurisdiction over the cause. If a distinct interest vested in Cameron, so that substantial justice (so far as he was interested,) could be done, without affecting the other defendants, the jurisdiction of the court might be exercised as to him alone."

In *Mallow vs. Hinde*, 12 Wheaton, 194, the principle is affirmed, that though the rules as to parties in equity are somewhat flexible, yet, where the court can make no decree between the parties before it, upon their own rights, which are independent of the rights of those not before it, it will not act. The court say: "We do not put it on the ground of jurisdiction, but upon a broader ground, which must apply to all courts of equity, whatever be their jurisdiction."

In *Russell vs. Clarke's Executors*, 7 Cranch, 98, the court say, that merely formal parties might be dispensed with; but where parties are essential to the merits of the question, and may be much affected by the decree, such parties are indispensable.

The principle enunciated by the Supreme Court in foregoing cases, is a reiteration of one universally recognized in equity jurisprudence. (Story's Eq. Pl. § 137.)

The rule in equity differs from the rule of law, both in the necessity of joining all interested parties in the suit, and in the option of joining them as plaintiffs or defendants. At law, a disputed issue is alone contested, the immediate disputants are alone bound by the decision, and they alone are parties to the action. In equity a decree is asked, and not a decision only; and it is therefore requisite that all persons should be before the court, whose interests may be affected by the proposed decree, or whose concurrence is necessary to a complete arrangement. (Adams' Equity, 699, 703, 704.)

The act of Congress of February 28, 1839, 5 Laws U. S. 321, and the forty-seventh equity rule of this court, have been cited by complainant's solicitors and relied on to sustain the jurisdiction in this case. They have also adduced the case of *Doremus and others vs. Nixon and others*, 4 McLean, 126, as to the interpretation of the act of Congress. That was a case at law. Now, it is true, that by their provisions, the Circuit Courts of the United States are authorized, in certain cases, to proceed against one or more defendants in the absence of others, where such others are not

inhabitants in, or found in the district when and where the suit is brought. But both the act of Congress and the forty-seventh rule have been elaborately considered, and the construction of them fixed by the Supreme Court of the United States in the recent case of *Shields vs. Barron*, 17 Howard, 141. In that case it is settled that neither the act of Congress nor the rule impinges on the general doctrine, and that if the citizenship of parties be such that their joinder would defeat the jurisdiction of the court, such fact will not supersede the necessity of making them parties; so far as the said act and rule apply to suits in equity, it is to be understood they are no more than the legislative affirmance of the rule previously established by the adjudications of the Supreme Court of the United States. The act of Congress removed any difficulty as to jurisdiction between parties who are competent under the general rule of equity jurisprudence, and the forty-seventh rule of practice is only a declaration for the government of practitioners and courts, of the effect of the act of Congress and the previous decisions of the Supreme Court. "It remains," say the court, "that a Circuit Court can make no decree between the parties to the suit which so far involves or depends upon the rights of an absent person that complete and full justice cannot be done between parties to the suit, without affecting those rights." (17 How. 141.)

The general rule as to the parties to a bill is not, then, altered by the act of Congress and the equity rule cited by solicitors for complainants, nor is that rule affected by the limited jurisdiction of the courts of the United States. The fact that a person is without the reach of the process of the court will not dispense with the necessity of making such person a party, provided he is an indispensable one.

Parties to bills are divided into three classes, 17 How. 141. 1. Nominal. 2. Necessary. 3. Indispensable. If a nominal party is beyond the reach of the process of the court, being a party having no interest to be affected by the proposed decree, that fact cannot defeat the proposed jurisdiction of the court. An instance of this class of parties is where one is joined as a party for sake of conformity in the bill, having no interest, legal or equitable, to be

affected by the decree. The second class, known as necessary parties, are such as have an interest in the controversy, and ought to be made parties to enable the court to do complete justice by adjusting all the rights involved ; still, if their interests are separable from those before the court, they are not indispensable parties. Mr. Justice Curtis has referred, as an instance of a necessary party, to the case of *Osborn vs. The Bank of the United States*, 9 Wheaton, 738. This case has been cited, by solicitors for complainants, as the strongest case, and in their written brief upon the point under consideration, they say : " This [case] seems to us conclusive as to the rule in a case of trespass." It is due to the able counsel and to the importance of the question, that proper consideration be paid to this case. We shall give it that consideration hereafter.

The third class of cases enumerated by Mr. Justice Curtis are the indispensable, who have such an interest in the controversy that a decree cannot be made without affecting that interest, and the inquiry is, Do the pleadings in this case disclose the fact, that there are absent persons whose interests make them indispensable parties ? The rule we are considering, laid down generally is, that where the rights of an absent person will be much affected by the decree asked for, the court cannot proceed to a decree. This general rule is to be applied to the circumstances of each case as they shall arise. By ascertaining how this rule has been applied in precedent cases, we will understand how to apply it to the case at bar.

In *Mallow vs. Hinde*, 12 Wheaton, 194, the complainant set up a claim to a tract of land, under a survey, No. 537, in the name of John Campbell, who, by his will, devised and bequeathed this, among other muniments of title, to Richard Taylor and others, executors in trust for the children of his sister. Taylor alone qualified and took upon himself the execution of the trust. He never assigned or conveyed to the *cestuis que trust*, but permitted them to take the management of them into their own hands. Subsequently, when these last had arrived at full age, they entered into contracts with one Elias Langham, whereby he became entitled to survey No. 537, and he subsequently conveyed the land to complainants. Thus stood the case, when the defendant Hinde, with

full knowledge of the rights of complainant, procured from Taylor a military warrant belonging to him (Taylor) in his own right, made an entry thereof in his (Hinde's) right, and having caused a survey to be made thereupon covering survey No. 537, obtained a patent for the land. Having thus got the legal title, he instituted actions of ejectment against the complainants, and obtained judgments of eviction against them. A bill, setting forth the whole transaction, charging notice of complainants' rights, and gross fraud against defendant, was filed, which prayed for an injunction to enjoin defendant from proceeding on his judgment, and for general relief. Here was as tortious an act, and as great a fraud as could be perpetrated under the forms of law, charged upon defendant. The defendant denied all fraud, set up the *bona fides* of the transaction, neither admitted nor denied the contracts between the *cestuis que trust* and Langham, and insisted, if there were any such, they were fraudulent. Neither Taylor nor the *cestuis que trust* were made parties, being out of the jurisdiction of the court. An objection for want of parties arose, and it was insisted that both Taylor and the *cestuis que trust* were indispensable parties.

The court so decided. They say: The complainants claim through certain contracts made between Langham and the *cestui que trusts*. How can a court of equity decide that such contracts ought to be decreed specifically without having the parties before them? Such a proceeding would be contrary to all rules which govern a court of equity, and against the principles of natural justice. In respect to Taylor, it was urged that he had parted with his "incidental right;" but the court determined that he, as well as the *cestuis que trust*, were indispensable parties. "If," say the Supreme Court, "the United States Courts were courts of general jurisdiction, it could not be doubted that the absent persons would be indispensable parties." But it is urged that the rule which prevails in courts of equity generally, that all the parties in interest shall be brought before the court, &c., ought not to be adopted by the courts of the United States, because, from the peculiar structure of their limited jurisdiction over persons, the application of the rule in its full extent would often oust the court of its acknowledged

jurisdiction over the persons and subject before it. In answer to such argument, the court proceeds to show that no modification of the rule to an extent by which the rights of an absent person may be materially affected, is admissible, and conclude by saying—"We put this case on the ground that no court of equity can adjudicate directly upon a person's rights without the party being actually or constructively before the court," and the bill was found defective for want of parties.

In *Brooks vs. Burt*, 1 Beavan, 106, 17 Eng. Chan. Rep. 106, a bill was brought by one tenant in common against defendant, who, it was alleged, had wrongfully and in defiance of complainant's title, entered into possession and received the rents and profits of the property; it was further alleged, that complainants had commenced an action of ejectment for the premises which defendant defended; that before the trial of such ejectment, plaintiff discovered that the property was subject to an outstanding term which was vested in one Mr. Worsley, which defendant threatened to set up to defeat the action at law; and lastly, the bill alleged that James Wavel, the co-tenant in common with plaintiff, was at the time residing out of the jurisdiction of the court. (It should be observed here, that the objection was, that the co-tenant in common was not made a party complainant.) There was a general demurrer for want of equity, on the ground that Wavel the co-tenant, and Worsley, in whom the outstanding term was vested, were indispensable parties to the bill. The court decided that the holder of the outstanding term was not, but that the co-tenant was. On the argument it was urged in relation to Wavel, that he was part owner of the property; that among other things prayed for, was a declaration of right, the delivery of the title deeds of the property, and for an account of the rents and profits, matters in which the absent party was interested, and that, therefore, the suit which sought to deal with the inheritance was defective for want of parties. To this complainants replied, that the proposition embodied in the objection was, that if there be twenty tenants in common, and a stranger get possession, one of the tenants in common cannot recover the possession of the rents and profits from the stranger with-

out making the other nineteen persons with whom he has no dispute, parties to the suit; that this was an ejectment bill, and must be governed by the same rules as an ejectment at law; that Wavel the co-tenant, was out of the jurisdiction of the court. Lastly, it was urged that the complainants were entitled to some portion of the relief prayed for, and at the time of the hearing, he might waive part of the relief sought, and obtain the rest; that the demurrer, therefore, covered too much, and must be overruled.

Such were the arguments by complainant in that case, and they are similar to those urged in the case by complainant's solicitors. To all, the Master of the Rolls replied: "It appears to me, this demurrer must be allowed. * * * Where the demurrer is for want of parties, it is not sufficient for plaintiff to say, that there is some part of the relief which cannot be abandoned at the hearing. * * * The bill prays for accounts and the delivery of title deeds. * * * I conceive Wavel is a necessary party. * * * The demurrer must be allowed." 1 Beavan, 106.

In *Turner vs. Hill*, 11 Simons, 2, a bill was filed to compel defendant to transfer her share in a mine to complainant, which, it was alleged, she had obtained by fraudulent means, and to account for and to pay to plaintiff the profits thereof, and that a receiver might be appointed of the profits of the mines. It was objected that the other adventurers in the mine were indispensable parties, inasmuch as an account was called for, and the vice chancellor decided against the objection on the sole ground that the bill did not call for an account of the mine, but for that of the specific share sued for. He says: "That passage in the prayer of the bill, which asks for a receiver of the profits of the whole mines, is clearly a mistake, for the plaintiff is seeking, by his bill, to recover no more than a hundredth share of the mines; and therefore, in common fairness of construction, that passage ought to be referred to the profits of that share." Considering such to be the fair construction of the bill, he decided it was unnecessary to make the other shareholders parties.

A similar decision, for the same reasons, was made in the case of *Turner vs. Borlase*, 11 Simons, 17; an appeal was carried to the

Lord Chancellor, 11 Simons, 18, and the decision in it confirmed, the distinction drawn between a prayer for the profits of the mine and those of the particular share sued for, being carefully sustained.

In giving his decision on the appeal, the Chancellor said: "It was, however, observed, that the bill prayed a receiver of the profits of the mines; and if that must necessarily be intended to mean the general profits of the mine, it would be asking for that which could not be granted, in the absence of all the other adventurers; but I do not understand the expression to have that meaning. All the case made and relief asked, relate to the particular shares, &c., and I must understand the profits as to which the receiver is asked, to be the profits spoken of, which makes the whole consistent, and *for which purpose* the other adventurers would not be necessary parties." (11 Simons.)

The decision of the court below was therefore affirmed, and the demurrer overruled; but the Chancellor, in conclusion, declared that his judgment on the demurrer was on the facts admitted by it; but if the facts at the hearing so admitted were not sustained, the opinion he had just delivered could have no bearing on the case.

The principles deducible from foregoing authorities are—

1. That the general rule in equity is, that all persons whose interests may be materially affected by a decree, must be before the court to enable it to act.
2. That this rule may be relaxed so as to dispose with formal, and, under special circumstances, with necessary parties.
3. That the rule which has been announced by the decisions of the Supreme Court of the United States is but a reiteration of the doctrine of a court of equity in the application of its chancery jurisdiction.
4. That the act of Congress of February 28, 1839, and the forty-seventh rule of equity, which allow one or more defendants to be sued in the absence of others without the jurisdiction of the court, apply only to competent parties, are simply an affirmation of previous decisions of the Supreme Court of the United States, and do not vary the rule as to indispensable parties. (17 How. 141.)
5. That the peculiar structure of the limited jurisdiction of the

courts of the United States does not abolish or modify the rule as to indispensable parties ; and the fact that such are without the jurisdiction, will not enable the court to proceed against the parties before it.

6. That it has been decided by the Supreme Court of the United States, 12 Wheaton, 194, that where complainant seeks to set aside a fraudulent purchase of land by defendant, and to enjoin his proceeding on a judgment he had obtained in an ejectment at law against complainant, the party through whom latter claimed his equitable title, was an indispensable party.

7. That it has been decided in the English Chancery, 1 Beavan, 106, that one tenant in common cannot, without joining with him his co-tenant, sustain a bill in equity against the trespasser in possession, and enjoin him from setting up an outstanding term, inasmuch as the bill prayed for the delivery of title deeds and account of the rents, these being matters in which the absent person was interested, and was therefore an indispensable party ; that where a question arises as to parties, it is not for the complainant to say, the court must proceed to a hearing when he, (complainant,) may disclaim a part of the relief and obtain the balance ; and, lastly, that the fact that the absent party resided out of the jurisdiction of the court made no difference in the application of the rule. These last principles are deducible from the case of *Brooks vs. Burt*, 1 Beavan, 105. It is to be again noted, that this was a case brought by one tenant in common to assert a right against a wrong-doer, and the absent tenant in common was deemed an indispensable party.

How much stronger is the case at bar, where it is sought to injuriously affect the rights of part owners, who are absent ? If, in the former case, the person is deemed an indispensable party, *a fortiori* he must be so deemed in the latter.

8. That it has been decided that, where a bill is filed to compel defendant to transfer to complainant a share in a mine fraudulently obtained by him, and to account for the profits thereof, jurisdiction will be sustained on the ground, that the bill seeks only a specific share in the profits thereof ; but it is expressly affirmed, that if the bill had sought for a delivery of title papers, which touches the in-

Upon the authority of the cases cited above, I cannot doubt that heritance, or for an account of the mines, these being matters in which the other adventurers in the mine were interested, the court could not proceed, such other adventurers being indispensable parties.

Let us apply those principles to the case at bar. The complainants in their bill allege title to certain premises situate in this State; that defendants have wrongfully entered into possession thereof, and are committing a trespass thereon by cutting down timber and excavating mines or minerals therefrom, and that they, (the complainants,) have instituted an action of ejectment against the defendants for the purpose of evicting them therefrom. The bill prays against defendants—

1. That an account be taken for the year preceding the filing of the bill, of the amount of timber cut and destroyed on the premises, and a similar account of the quicksilver so taken.

2. That injunction may issue to restrain defendants from further trespass.

3. That a receiver be appointed to take charge of the mine, and the reducing establishment connected therewith, and all the products thereof, now within the jurisdiction of this court.

4. That on the final hearing, the conveyances made under which defendants claim title, may be ordered to be delivered up and canceled, the injunction made perpetual and for general relief.

An answer has been filed, and the facts necessary to be looked to in connection with the question as to parties, are, that there are proprietors of the mine and land other than defendants. That of them, four in number, viz: Eustaquio Barron, Eustachio M. Barron, Martin La Piedra, and Martin Ortiz, are without the jurisdiction of this court; that John Parrott and James R. Bolton are also co-owners of the premises, and they are within the reach of the process of the court. It is further averred, that long before the institution of the action of ejectment at law, and before the exhibiting of the bill, a contract was entered into by the owners of the mine with certain persons, for the working of them, and it is contended that both the proprietors and contractors should be made parties.

the owners are indispensable parties in this case. In the opinion of the court the authority of cases is hardly needed.

What is the character of this bill? It does not seek the interposition of this court to recover the specific shares of the mine or land, and the profits thereof, property of the defendants. If it did, it would come within the authorities, and the limits of natural justice. But the bill asks, that an account of profits belonging to other people, and title deeds to property, in which those other and absent persons are as much interested and to a larger extent than the defendants themselves, shall be canceled. It further asks that the profits of all the owners should be wrested from them and paid into the hands of a receiver. Now, can this court call for an account of the profits of the mine, or arrest such profits, or direct a cancellation and delivery of the title deeds, in the absence of parties both within and without the reach of its process, who are interested in those profits and those title deeds? Were the court to do any one of these things, would not the rights of the absent be materially affected? It is urged that the court can entertain jurisdiction of this case, issue the injunction, and wait until the hearing, when the complainant may waive a portion of the relief prayed for, and the court can decree so much of that relief as they may be entitled to. This course would be contrary to authority, and in violation of the reason of the thing. We have seen, that the Lord Chancellor has said in *Brooks vs. Hurt*, that when the question of parties arises, it is not sufficient for the complainant to say "that there is some part of the relief which can be abandoned at the hearing." Again; apart from authority, on what ground of justice or reason can this court arrest, by injunction, the profits of the mine from absent persons until the hearing, for the purpose of ultimately getting an account from the defendants of their specific interests? Would the arrest of these profits "affect" the interest of the absent owners? If so, should a court of equity proceed in their absence? "*Audi alteram partem*" is alike a dictate of natural justice and a precept of municipal law. I have searched in vain for a precedent that would justify this course. The able counsel for complainants would have found such, if any existed. The case of *Osborne vs.*

The Bank United States has been adduced as the authority which seems to them conclusive in favor of such jurisdiction, and it has been intimated to me by one of the counsel, that it has been exhibited to several of his professional brethren, who concur in the opinion that it is conclusive on the point. That case, therefore, merits attention.

The opinion in that case occupies seventy-six pages of the reporter. To show what were the points decided, by traveling through it, would be time misspent. But there is a short method of doing this, and one, perhaps, which will conduct to a more correct conclusion than any this court could pursue. By reference to the prospectus, published by Mr. Justice Curtis, in 17 Howard, it will be found, that his plan, in giving his new edition of the Supreme Court reports, was to endeavor to give, in the head notes, the substance of each decision. They are designed, he says, to show the points decided by the court, not the *dicta*, or reasonings of the court. Now, upon reference to his head notes to *Osborne vs. The Bank of the United States*, we find that the only points which, in his opinion, were decided in that case, which touch the question under consideration, are—1. A court of equity may restrain, by injunction, a public officer of a State from acting under a void law of a State, to destroy a franchise. 2. As the State cannot be joined as a defendant, its agent may be sued alone; and if he has specific moneys or notes wrongfully taken, in his possession, they may be ordered to be returned.

So far as any decision in this case goes, it does not touch the case at bar. But reference has been had to certain observations made by Chief Justice Marshall, while delivering the opinion of the court, and citations from the opinion have been inserted in the brief of solicitors for complainant, which are deemed directly applicable to the case at bar. The first citation is from 9 Wheaton, p. 842, and is as follows: "The single act of levying the tax in the first instance, is the cause of an action at law; but that only affords a remedy in chancery, which prevents the repetition and protects the privilege. The same conservative principle which induces the court to interpose its authority for the protection of exclusive privileges,

to prevent the commission of waste, even in some cases of trespass, and many cases of destruction, will, we think, apply in this. Indeed, trespass is destruction where there is no privity of estate. If the State of Ohio could have been made a party defendant, it can scarcely be doubted that this would be a strong case for an injunction. The objection is, that as the real party cannot be brought before the court, a suit cannot be maintained against the agents of that party, and cases have been cited to show that a court of chancery will not make a decree, unless all those who are interested are made parties to the suit. This is certainly true where it is in the power of the plaintiff to make them parties; but if the person who is the real principal, the person who is the true source of the mischief, by whose power and for whose advantage it is done, be exempt from all judicial process, it would be subversive of the best established principles to say, that the laws could not afford the same remedy against the agent employed in doing the wrong which they would afford against him, could his principal be joined in the suit." "It is admitted that the privilege is not communicated to the agent, for the appellants acknowledge that an action at law would lie against the agent, in which full compensation ought to be made for the injury. It being admitted, then, that the agent is not privileged by his connection with his principal, that he is responsible for his own act to the full extent of the injury, why should not the preventive power of the court also be applied to him? Why may it not restrain him from the commission of a wrong which it would punish him for committing?"

The propositions asserted in the above observations are—

1. That though the single act of an illegal tax is the subject of an action at law, its repetition makes a continuing trespass, which a court of equity may enjoin.
2. That where the principal is exempt from all judicial process, being a sovereign State, the privilege which belongs to such principal is not communicated to the agent who does the wrong.
3. That under such circumstances the court, acting on the principle, "*Lex non cogit impossibilia*," will, at instance of complainant, issue an injunction to restrain the agent from committing the tortious act.

These propositions cannot control this case :

1. Because there is no question of principal and agent in this case.

2. The necessity of dispensing with a necessary party who was exempt from judicial process, does not exist in this case. (On page 846, C. J. Marshall says : " Had it been in the power of complainant to make it [the State] a party, perhaps no decree ought to have been pronounced.")

3. Because the attempt in this case is to make defendants liable as principals in a tort, and ask the court to arrest the profits of absent parties for the purpose of making defendants responsible for the consequences of their own tortious act.

There are two other citations from the opinion of the court. The first is, a continuation of the first above quoted, and is in these words : " We put out of view the character of the principal as a sovereign State, because that is made a distinct point, and consider the question as respects the want of parties." Here this second citation ceases, and another is taken from the succeeding page (845) as follows : " In the regular course of things the agent must pay over the money immediately to his principal, and would thus place it beyond the injured party, since his principal is not amenable to the law. The remedy for the injury would be against the agent only, and what agent could make compensation for such injury ? The remedy would have nothing real in it. It would be a remedy in name only, not in substance. This alone would, in our opinion, be a sufficient reason for a court of equity. The injury would, in fact, be irreparable, and the cases are innumerable in which injunctions are awarded on this ground." Now, this latter citation establishes this proposition, viz : That the agent would pay over to the principal, who was exempt from all judicial process, and being unable to respond to the damages, the injury would be irreparable, and, therefore, it is ground for injunction. To this extent it goes ; but the whole is dependent for its application upon the fact, whether defendant is responsible upon an implied contract solely for the amount in his hands. This is evident, as the court puts the hypo-

thesis, "Now, *if* the party before the court could be responsible for the whole injury," &c.

To prove why the court considers the defendant liable, it is necessary to cite the remarks which intervene between the two quotations cited above: "Now, *if* the party," say the court, "could be responsible for the whole injury, why may he not be restrained," &c.

The appellants found their distinction on the legal principle, that all trespasses are several as well as joint, without inquiring into the validity of this reason, if it be true. We ask if it be true? Will it be said, that the action of trespass is the only remedy given for this injury? Can it be denied that an action on the case for money had and received to the plaintiff's use, might be maintained? We think it cannot; and if such an action might be maintained, no plausible reason suggests itself to us for the opinion that an injunction may not be awarded to restrain the agent with as much propriety as it might be awarded to restrain the principal, could the principal be made a party." It was on the ground, then, that the equitable action for money had and received could be maintained against the agent—for money in his hands, and received by him in legal consideration, to the use of plaintiff—that C. J. Marshall uses the observations quoted to sustain the proposition that injunction might issue to restrain the payment over by the agent to his principal. Can this apply to the case at bar? No one pretends that such action could lie against defendants in this case. Independently of all other views, there is one which covers this whole case, and precludes the idea that it can control the one at bar. It has been shown, that the absent parties are indispensable in this case. Such was not the fact in the case relied on. The State of Ohio was but a necessary party, and there was a discretion in the court to dispense with such party. True, the interest of the State, in *quantity*, extended to the whole amount in controversy; but what was the *nature* of that interest? It was not a vested nor an equitable interest. It was never in the possession of the absent party, nor had the State an equitable right to it, for the court never could recognize the possession of a fund, or an equitable right to it, for the court never could recognize the possession of a fund, or an equi-

table right to possession in the principal, where that fund had been raised *in fraudem legis* by the agent. The object of the bill was to arrest the fund in its transit from the agent to the principal. Hence, the nature of the interest held by the State was, to use the language of Mr. Clay, in his argument, "a collateral and contingent interest," which will not make a party who must be joined. Hence, again, Mr. Justice Curtis, in 1855, in the case of *Shields vs. Barron*, 17 How. 143, in his classification of parties, enumerates several instances of the different kinds of parties, excluding the case of *Osborne vs. The Bank United States* from the class of indispensable, and including it among that of necessary parties, which latter, as we have seen, may, under peculiar circumstances, be dispensed with.

It is by attention to the distinction between necessary and indispensable parties, that the numerous decisions of the courts, made in the application of the general rule, may be harmonized.

Cases have been referred to, in which persons who are without the reach of the process of the court, have been dispensed with ; but in all such it will be found, that the absent persons were either a formal or necessary party, but not deemed indispensable.

In this case I am satisfied that the owners of the mines are parties whose interests must necessarily be affected by any decree which can be made in conformity with the prayer of this bill. Cases are also cited to show that the courts of the United States will consider the rule as to parties flexible where the absent persons, who should be made parties, are out of the reach of the process of the court ; but in each of them it will be found, that the utmost extent to which a relaxation has been carried, has been to dispense with a necessary party only. But there is one feature in this case which distinguishes it from all others. It is, that two of the absent persons, whose interests would be affected by a decree, are residents of this city, and within the reach of the process of this court. The only reason for their omission as parties is the fact, that their introduction would oust the jurisdiction of this court. But if bringing them before the court, this case would be beyond

its jurisdiction, can the court, by indirection, adjudicate upon their rights, and thus do indirectly what it could not rightfully directly do? I think not.

The present motion is, therefore, denied, and it is ordered accordingly.

SHORT NOTES OF RECENT AMERICAN DECISIONS.

Supreme Court of Ohio, Adjourned Term, 1856.

The State of Ohio on the relation of the Prosecuting Attorney of Sandusky County vs. Ralph P. Buckland, Ebenezer Lane and others. Information. BARTLEY, J., Held—

1. That a judge of the Common Pleas has the authority, in the exercise of chamber powers, as a member of the District Court of any county of the proper district, to grant leave to file an information in the nature of quo warranto, in the District Court.

2. That the authority of the prosecuting attorney of any county to file an information in the nature of a quo warranto, given by the statute relating to informations in the nature of quo warranto, passed March 17, 1838, is not repealed or superceded by any provisions of the act prescribing the duties of the Attorney General, passed May 1, 1852.

3. That where such information charges the defendants, as an association of persons, with usurping or illegally exercising a franchise, and assuming to act as a corporation, without sufficient authority of law, for the fraudulent purpose of enabling another or a legally constituted corporation to evade an injunction of the Supreme Court, restraining it from doing an act unwarranted by law, and in violation of its corporate powers, the District Court may have jurisdiction of the case, if it appears that the principal office of the association, or the office of the president thereof, be within the county.

Motion to quash the information overruled, and cause remanded.

William H. Raymond et al. vs. James M. Whitney et al., BRINKERHOOF, J., Held—

1. Where water craft is seized by virtue of a warrant regularly issued under the act of February 26, 1840, "to provide for the collection of claims

against steamboats and other watercrafts," &c., and the same is discharged from the custody of the sheriff, and delivered to the owner on board, being given, as authorized by the fifth section of said act, the officer making such seizure retains a lien on the water-craft for the benefit of the plaintiff and sureties, and a right to reclaim the same, as against all prior creditors of the craft making subsequent seizures thereof, in order that the craft may be forthcoming, to answer the judgment to be rendered under the prior seizure.

2. Such judgment may, in a proceeding in chancery, instituted by the plaintiff in the first seizure, for the assertion and protection of his own priority of lien, be impeached for fraud and collusion between the plaintiff and the owner of the craft, in the obtaining of said judgment.

3. The fact that counsel for creditors making subsequent seizures appeared on the trial, and defended against the claim of the plaintiff in the first seizure, may be competent evidence on the question of fraud and collusion in obtaining the judgment, but is not, in law, conclusive of such question.

John Boose vs. The State of Ohio. Writ of error to the Common Pleas of Butler county, BARTLEY, J., Held—

1. The record of a judgment in a criminal case, which shows that the jury upon being "*empaneled and sworn the truth to speak upon the issue joined between the parties,*" and after having heard the evidence and charge of the court, upon their oaths did say, that the defendant is guilty as charged, &c., is sufficient, without the addition of the words "*according to the law and the evidence,*" in connection with the oath to render a verdict on the issue joined.

2. A count of an indictment for the crime of robbery, under the 15th section of the statute for the punishment of crimes, charging the taking of the personal property by the words "*feloniously and violently did seize, take and carry away,*" without any allegation of the intent to steal or rob, is defective.

3. Where an indictment in a count charging a burglary under the 14th section of the statute, avers the intent to steal the "*personal property*" of a person named, without an express allegation that the property is of any value, the term property, *ex vi termini*, imports value.

4. A judgment on a general verdict of guilty on an indictment containing some good and some bad counts, is not erroneous, because not rendered with express reference to the good counts. Judgment of the Common Pleas affirmed.

L. Howlett vs. J. P. Bruck et al., Directors of the Ohio Penitentiary.
J. R. SWAN, J., Held—

The Directors of the Ohio Penitentiary gave notice that they would receive proposals for the labor of fifty convicts, to be worked at the manufacture of wood type, rules, try squares, &c., &c., and that bids would be considered for the manufacture of any other articles or other kinds of business. Howlett made the highest bid (63 cents) for convicts, to work at the cooping business. The Directors refused to enter into a contract with Howlett, but closed a contract with Day Brothers for the manufacture of wood types, at a bid less than Howlett's. Held that under the notice and statute, the Directors were authorized to exercise a discretion in regard to Howlett's bid, and to reject it. Mandamus refused.

James N. Dickson et al. vs. L. and S. Rawson et al. Chancery. Reserved in Stark county. RANNEY, C. J., delivered the opinion of the court. Held—

1. An assignment of property by an insolvent debtor to certain creditors of his, for the purpose of paying debts due to them, and also other preferred creditors, is within the provisions of the third section of the act of March 14, 1838, (Swan's Stat. 717,) and enure to the benefit of all the creditors of the assignor.

2. It is immaterial whether such assignment is made for the benefit of the preferred creditor, not being an assignee, or to indemnify the surety of the assignor to such creditor.

3. In either case the assignment secures the debt, and entitles the creditor to compel an application of the fund to its payment.

4. The character and legal effect of such an assignment is determined at the time it is made; and is not changed by the fact that the property assigned turns out to be no more than sufficient to pay the assignees.

5. If, at the time it is made and accepted, it subjects the assignee to account to any other creditor of the assignor, the assignment is in trust, and the assignee a trustee within the meaning of that act.

Decree accordingly.

Joseph Howard, Executor of Mary Ann Wagg vs. Lydia Gibbens. Error to the District Court of Washington county. RANNEY, C. J., delivered the opinion of the court. Held—A married woman, abandoned by her husband in a foreign country, coming to this State to reside, is competent to contract in respect to necessities for her support and maintenance, and to sue and be sued, in the same manner as a *feme sole*. Judgment affirmed.

In the Court of Chancery of New Jersey.

STOUTENBURG vs. TOMPKINS, 1 Stock. N. J. Ch. Rep. 332.

Specific performance, when enforced.—A court will not decree a specific performance where it would be inequitable under all the circumstances of the case. Where a contract is hard and destitute of all equity, the court will leave parties to their remedy at law.

A defendant cannot resist a specific performance on the ground that the argument entered into differs from that which was reduced to writing, without showing that the difference was the result of fraud, mistake, accident, or surprise.

It is well settled that specific performance is discretionary with courts of equity, and a defendant will generally succeed in procuring a dismissal of the bill if he convinces the court that the exercise of the jurisdiction will be inequitable under the circumstances.

One who has been in the enjoyment of property under an agreement, and has surrendered and abandoned it; who has betrayed the confidence existing between the parties, and has, by his conduct and dealings with the defendant and his treatment of the property, beguiled the defendant into the belief that he intended to give up all his rights and interest in the contract, comes into court with a case wholly void of equity when he demands a specific performance.

A want of mutuality is an objection to a decree for a specific performance.

The court will not enforce a contract where the parties are not mutually bound to fulfil it.

So where the interest of a party in a contract passed into the hands of his assignee in bankruptcy, all reciprocity as to the remedy was destroyed; and if the assignee, or a person holding under him, seeks a specific performance, he must affirm the contract, and make it mutual at least within a reasonable time.

ATTORNEY GENERAL vs. HUDSON RIVER RAILROAD, 1 Stock. N. J. Ch. Rep. 526.

Unavoidable obstruction of public river.—The slight but unavoidable obstruction of public rivers by a railroad company under the authority of their charter, is a necessary evil which must be borne for the sake of the public good which demands it. That which would otherwise be a nuisance, if done under the authority of law for the public good, is justifiable.

NOTICES OF NEW BOOKS.

A PRACTICAL TREATISE ON POWERS, by the Right Hon. Sir Edward Sugden. The third American, from the seventh London edition, with additional references to American Cases. In two volumes, Philadelphia : T. & J. W. Johnson. 1856.

This is a new American edition of Sir Edward Sugden's famous work. If its subject be not of as great importance in this country as in England, it is, nevertheless, of enough to require a familiarity with its doctrines. This may be considered to be *the only* work on this branch of law ; and it is, indeed, equally remarkable for its exhaustive learning, and the extraordinary logical power and critical acumen which it displays. No one can pretend to a knowledge of the law of real estate and conveyancing without a thorough acquaintance with this treatise.

OFFICIAL OPINIONS OF THE ATTORNEYS GENERAL OF THE UNITED STATES, ADVISING THE PRESIDENT AND HEADS OF DEPARTMENTS IN RELATION TO THE OFFICIAL DUTIES, AND EXPOUNDING THE CONSTITUTION, 'TREATIES WITH FOREIGN GOVERNMENTS AND INDIAN TRIBES, AND THE PUBLIC LAWS OF THE COUNTRY. Edited by C. C. Andrews, Counsellor at law. Vol. VI. Washington: Published by Robert Farnham, 1856. pp. 774.

Mr. Andrews is entitled to the thanks of his professional brethren for the very satisfactory manner in which he has presented these opinions. Each opinion is accompanied by a short and exact syllabus, in the usual manner of law reports. This greatly facilitates the ease of consultation, and deserves high commendation for the accuracy and care with which it has been done. The business of the Attorney General's office has become so extended and complicated, that some permanent shape to the legal opinions of that department is indispensable, both for the use of the office itself, and for those having business with it.

REPORTS OF CASES ARGUED AND DETERMINED IN THE SUPREME COURT OF ALABAMA, during the January Term, 1856, by J. W. Shepherd, State Reporter, Vol. XXVIII. Montgomery : Barrett & Wimbish, 1856. pp. 800.

From the brief examination we have been enabled to give this volume, we have received a very favorable impression. We propose in our next number to give a few short notes of the more important cases, which will enable the reader to form his own judgment and put into practical use the labors of the reporter.

PENNSYLVANIA STATE REPORTS, Vol. XXVI, comprising cases adjudged in the Supreme Court of Pennsylvania, by Joseph Casey, State Reporter, Vol. 2, Philadelphia: Kay & Brother, 1856. pp. 575.

This is the second volume that Mr. Casey has given to his professional brethren, and is certainly prepared with care, and a manifest improvement on the former one, which itself far excelled some of the volumes immediately preceding it. The cases now published, present the usual diversity that must always characterize the litigation of a commercial and prosperous people. *Kieffer vs. Imhoff*, p. 438, on the law of easements; *Myers vs. The Insurance Company*, p. 192, on the subject of seaworthiness; *Erie Railroad vs. Casey*, p. 287, on corporate privileges; *Bard vs. Yohn*, p. 482, on master and servant; and *Carson vs. Godley*, p. 111, on negligence, are important and interesting cases and well calculated to give the reader a favorable impression of the manner in which Mr. Casey has discharged his important but thankless task. This volume deserves special mention by reason of the excellence of its index, which is really a digest of the book, and cannot fail to prove highly useful.

ENGLISH REPORTS IN LAW AND EQUITY, containing reports of cases in the House of Lords, Privy Council, Courts of Equity and Common Law, and in the Admiralty and Ecclesiastical Courts, including also cases in Bankruptcy, and Crown Cases reserved. Edited by Chauncey Smith, Counsellor at Law, Vol. XXIV. Boston, Little, Brown & Co., 1856. pp. 658.

This is one of the usual volumes of English reports, a series which has now become a part of almost all law libraries, both from the large number of courts of which it professes to give the reports, and from the annotations which the learned editor has appended to many of the cases referring to late authorities. Perhaps the only notice required, is an announcement of publication.

THE

AMERICAN LAW REGISTER.

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JANUARY, 1857.  
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MARITIME LIENS.

I.—LIEN OF THE SHIP ON THE CARGO.

Maritime law, and the principles of which it is constituted, are not composed of doubtful opinions, or fanciful and unsettled systems. Some of its regulations rest on positive adjudications; others, on usages established among nations from necessity, the utility of which has been demonstrated by a lengthy and satisfactory experience. The right of lien is one of those commercial regulations which are founded on manifest justice and comprehensive utility, and is a privilege which the law takes under its special protection. The right of the common carrier to retain the goods committed to his care, for the freight due thereon, most probably had its origin in the necessities of primary commercial intercourse, though subsequently abundantly ratified by direct authority, and now universally acknowledged as a principle of common law, which entitles a party who is *compelled* to receive and transport the goods of another, to *retain* them for his indemnity.¹

As far back as the authorities upon this subject lead us, we find the acknowledgment of this doctrine of retention for the satisfac-

¹ Smith's Mercantile Law, 585.

tion of legitimate claims, with the further assurance that it had been exercised for years.¹ It is thought we may safely assume that the general proposition, that the owner of a ship has a lien on the goods in his possession for the freight due under the contract of shipping, has never been questioned. It has received the sanction and support of an unbroken series of decisions, until now the general rules of the common law concerning liens are well settled. In consideration of the duties and liabilities imposed upon persons engaged in certain business, or on account of the usages of trade, the law recognizes in those whose expenditures or services have contributed to enhance the value of the property of others in their hands, the right to retain the possession of that property, until compensation has been made for their labor and consequent advancement of value.²

This privilege of retaining possession of the cargo, until freight was discharged, appears to have been allowed by the maritime codes of Europe. By the civil law, as well as by those of Oleron, the lading of the ship is subject to detention not only for the freight, but for the *primage* and *average* due in respect of it. A like privilege was given by the marine ordinance of France, and according to the present acceptation of commercial law, whether the ship be a chartered or a general one, the master need not relinquish the possession of any part of the cargo, until the freight and charges due on its account are discharged.

It may be stated in beginning, that freight only becomes due at the common law, for the regularly bringing of the goods to the place of destination, pursuant to the stipulations of the contract of shipping, and only under such circumstances can the claim of lien be attached to the cargo. The shipper may, however, waive by an independent agreement, the further prosecution of the voyage and receive the goods at an intermediate port, and then a lien exists for the amount specified in the special contract.³ As we have before said, the right of lien, is the right of retaining possession of certain property, till your claim against it is discharged.⁴ The fact of

¹ 2 *Ld. Raym.* 752.

² 10 *Conn.* 104.

³ 8 *Sumn.* 542.

⁴ 4 *Johns. Ch.* 582; 20 *Johns.* 611.

retention, implies of necessity, a *previous lawful and legitimate possession*, and of course this privilege can only be exercised when the owner of a vessel has possession and control of his ship himself, for then only does he have constructive possession of the goods on board, so as to justify a claim for lien.¹ The owner is entitled to detain any part of the merchandise for the freight of all that is conveyed on account of the same person, for he only lessens, and does not destroy or conclude his security by delivering up any part of it.² "The lading of the ship," says Molloy, "is in construction of law, tacitly obliged for the freight, the same being in point of fact, preferred to any other debts to which the goods so laden are liable. Even though such debts are precedent to the freight, for the goods remain, as it were, *bailed* for the same; nor are they subject to attachment in the master's hands, though vulgarly is conceived otherwise."³

As the right of detention is only intended for the better security of those who perform services or incur expenses in respect of property in their hands, such person may limit or waive this right by virtue of a special contract. This lien has grown out of the usages of trade, and does not exist, and cannot be enforced when waived by inconsistency.⁴ If personal credit is given or another and an independent security is taken, for the payment of that debt for which the party has a lien, by such conduct the lien is vacated.⁵ If the ship owner claims possession of the goods for reasons different from his lien, he will be considered as having abandoned that security, and the goods will be discharged from the claim.⁶ A right of lien is not however determined by an alteration in the ownership of the goods over which it is exercised, after the claim has once attached.⁷ When the price of transportation is refused when tendered, or if in the absence of such tender, the ship owner has refused to deliver the goods upon payment of just freight, the possession becomes tortious, and the lien is lost.⁸ As continuance of possession

¹ 4 Mass. 91; 6 *Id.* 422; 11 *Id.* 72, 145; 1 Hall, 355.

² 6 East, 622; 3 Duer, 224.

³ *De Jure Maritimo*, B. 2, C. 4, S. 12; 6 M. & W. 36.

⁴ 18 Johns. 157.

⁵ 2 Bing. N. C. 755.

⁶ 2 Bing. 23.

⁷ 9 Bing. 574.

⁸ 9 M. & W. 675; 7 *Id.* 288.

is indispensable to the existence of this right, an abandonment of the custody of the matter over which this right extends, operates as an absolute waiver of the lien, for in such cases the holder yielding up the security which the lien afforded, trusts alone to the shipper's personal responsibility.¹

In case of charter-parties it often becomes a question of great moment to ascertain whether the terms and stipulations of that instrument are or are not inconsistent with the existence of a lien, for it is well settled that the owner of a vessel may by special contract relinquish his lien on goods carried under a bill of lading, or he may entirely divest himself of his rights and liabilities as owner, and by a charter-party demise them to another. As the benefit of this claim was originally designed for the protection of those who had entered into no agreement for the payment of freight, but relied exclusively on their common law rights, it was formerly considered that whenever a contract was entered into on that subject, there could be no lien.² This opinion was however controverted by high authority, and it was decided that the existence of a special contract between a common carrier and his employer concerning the services to be performed, and the compensation to be rendered, does not deprive the former of his privilege of lien, unless there is something in that contract inconsistent with such lien.³ It is needless perhaps, to say that the courts will favor and enforce the lien unless there plainly appears a relinquishment of such security by the owner of the vessel.⁴ In truth, the doctrine once so broadly asserted by the English courts, that by any charter-party, the rights and duties of the owner were suspended, and the charterer became owner *pro hoc vice*; that the owner had thereby parted with the possession and control of the ship and cargo, and of necessity could exercise no lien, has been much qualified and defined by subsequent decisions.⁵ Now, all the authorities upon this subject acknowledge the right of the vessel's owner to retain the goods of the charterer for the sum due by the terms of the charter-party, unless he has

¹ 1 Atkyn, 234; 1 Mo. & R. 252.

² 5 M. & S. 180; 10 Conn. 104.

³ Crosson Lien, 301; 7 Taunt. 14.

⁴ Sayer, 224; Buller's N. P. 45.

⁵ The Volunteer, 1 Sumn. 551

expressly and totally demised the possession of the ship to the occupier himself.¹ Whether the possession of a vessel and the accompanying privileges are thus designed to be given up and transferred to another, is a matter to be ascertained and determined by the intention of the parties as manifested in the terms of the charter-party, and by the actual circumstances of each case. The exposition of its opinion by our Supreme Court is at once clear and comprehensive. It holds, "that when the general owner retains the possession, command and navigation of his ship, and contracts to carry a cargo on freight for the voyage, the charter-party is a mere affreightment sounding in covenant. The owner does not transfer, but retains his character and legal privileges of ownership, and among them his right to retain the cargo for the satisfaction of his claims under the agreement."²

The Admiralty Courts of Great Britain, on account of an alleged want of jurisdiction, refuse to enforce a lien on the cargo other than for freight due, and will not permit a retention for breach of the conditions of a charter-party, such as those concerning dead-freight, demurrage &c.³ Our courts, adopting a more discerning public policy, have given efficacy and vitality to that principle of maritime law which studiously connects the interests of ship and cargo, and creates a reciprocal responsibility between the two, for the mutual advantage and more certain security of both.

With us there is a lien on goods laden on board the ship, for charges advanced,⁴ for security on an adjustment for general average,⁵ and when the whole of the ship is chartered at a specific rate per ton, the cargo must pay for what the ship could have carried, even though a full cargo had not been furnished.⁶ Indeed, the American decisions generally, sustain the marine law to its full extent, and agree that to every contract of shipping, whether by bill of lading or otherwise, there is tacitly annexed the covenant to make the cargo *in specie*, liable for the due performance of the terms of the agreement, and upon breach, lien is enforced.⁷

¹ 4 Cowen, 470; 8 Taunt. 280; 5 Moore, 211; 8 Bin. N. C. 17.

² 8 Cranch, 39; 8 Wheat, 605.

³ 2 Meriv, 401; 4 B. & Ald. 680.

⁴ 19 Barb. 305.

⁵ 18 Maine, 357.

⁶ 15 Johns. 327.

⁷ 4 Law Rep. 471; 8 Wheat. 605.

From the magnitude of the interests often involved, it becomes a question of considerable importance to know whether the owner's lien for his charter-party freight covers the goods of persons who have shipped under agreement with the charterer, and between whom and the owner of the vessel is no privity of contract; and if the goods so laden are liable at all, to what extent the responsibility amounts.

The cargo of the sub-freighters is liable to retention only for the freight which is due for the transportation of each individual consignment, and not for the whole amount specified in the charter-party as the hire of the ship.¹ That the ship should have a lien on each one of the lots of merchandise which it has conveyed, for the amount of the freight due for each separate lot, seems a conclusion at once equitable and necessary. Were it otherwise, by a collusive bargain with third parties, the charterer might deprive the owner of the vessel of the lien, to which, as carrier for the voyage, he was justly entitled.² To make the goods *in specie*, responsible for the freight earned by their carriage under each respective bill of lading, cannot prejudice the interests of the shipper, for the goods are in either case, obliged to that extent, and there should be no preference as to which party the freight money should be paid. But to extend their responsibility farther than this, would be to make the under freighters liable for the broken covenants, and non-performance of a private agreement between the owner and occupier of a vessel, of which they could know nothing; and on the other hand, would allow the charterer wrongfully to pledge the goods of another, for the satisfaction of his own debt.

In conclusion upon this branch of the subject which relates to the lien possessed by the ship, it may not be improper to state, that though the cargo itself is a security for the payment of freight, yet the determination of a consignment gives no liberty to the merchant shipper, to abandon it for the freight, for the contract of shipping does not contain any warranty against the happening of any such event.³ In this the provisions of our maritime code coincide with

¹ 2 Atkyn, 621.

² 4 B. & Ald. 630; 4 Camp. 298.

³ 3 John. 321.

the opinions of Pothier,¹ and Molloy,² who earnestly opposed the theory of Valin that the cargo was the *only* proper fund and pledge for the payment of the freight.

II.—LIEN OF THE CARGO ON THE SHIP.

"By custom" says Cleirac, "the ship is bound to the merchandise, and the merchandise to the ship."³ Of the two principles embraced in the first portion of this maxim, one is drawn from the common law, and the other from our commercial codes and maritime usages. The one,—that the owner of a ship is responsible as a common carrier, is not open to contestation.⁴ The other,—that the ship *in specie* is liable to the shipper on the undertaking in the bill of lading, for cargo taken on board, is less familiar in the settled adjudications, but is now admitted to be one of the most salutary regulations of the maritime law.⁵ This privilege stands upon a basis of exact reciprocity, and the right of the shipper to consider the ship itself as a pledge for the performance of the shipping contract is recommended as well by the dictates of reason and justice as by an enlarged and enlightened public policy. The condition of the owners is not made worse by rendering the ship liable. It is immaterial to them whether the debt is satisfied by the sale of that, or any other portion of their property, but it is not a matter of equal indifference to the shipper, whether or not he is allowed to look to the vessel itself for satisfaction, as this is not only his best, but often will be found to be his only security. A ship is of necessity a wanderer. She visits places where her owners are unknown or at least inaccessible. These and other kindred characteristics of marine commerce render it indispensable that the ship itself should be security for those who have demands against the owners. A lien exists in favor of a merchant who ships goods in a vessel, against the ship for the non-performance of the contract of transportation, and it is a claim which our admiralty courts enforce by process *in rem*. The ship is, of itself and aside from any personal liability of the owners, considered as a security to the person who lades goods

¹ *Traite de charte parte*, rum. 60.

² Molloy. B. 2, C. 4, S. 12.

³ Cleirac, *ut et Con.* 72.

⁴ 21 Wend, 193.

⁵ 8 Mason, 255.

on board of her.¹ Whether the vessel was under the control of the general owner for that particular voyage, or whether he had let her by charter-party to a third person who had entire direction and command, makes no difference as to this lien upon the vessel. The lien is enforced not only for the total loss of the goods laden on board, but for any damage they may sustain through the fault or neglect of the master, or by reason of the insufficiency of the vessel, rigging or crew. His remedy is not confined to an action *in personam* against the owner, but the vessel is by the law merchant hypothecated to the shipper for his damage, from the time the misfortune happens.² The owner of goods shipped and not delivered according to the bill of lading, has a lien on the vessel for their value.³ For the price of cargo sold during the voyage from necessity it has been thought a lien exists.⁴ The admiralty jurisdiction of England, though the general existence of this lien is admitted,⁵ deny that any power is possessed by them to enforce such lien against the ship *in rem*, and in favor of the merchant shipper. While with them, this useful and important principle remains unexercised and worthless, our courts have, upon solid and convincing reasons, adopted and enforced the regulations of the marine law.

By the general maritime law of Europe the vessel is liable only to the value of the ship and freight for obligations arising *ex delicto*, and by an abandonment of them they are discharged. According to Emerigon, such, besides being the modern acceptation of the ship owner's responsibility, was the nautical law of the middle ages.⁶

The reason urged for such a limitation was, that a complete responsibility tended to discourage the speedy enlargement of commerce. The endeavor to thus define the liabilities of ownership in vessels, has never succeeded in this country.⁷ With the exception of a few statutes passed by individual States, there is no departure

¹ 3 Kent's Com. 218; Ware, 263.

² The Rebecca, Ware, 188; 4 Law Rep. 384, 475.

³ 1 Blatch. & How. 300.

⁴ Cons. del Mare, chs. 105, 106; Cleirac Contrats marit. C. 4, art. 85, 86. Emerigon on Marit. Loans, C. 4, § 9; C 12. § 4.

⁵ Abb. on Ship, 126, 127.

⁶ 1 Contrats a la Grosse. C. 4. § 11.

⁷ The Rebecca, Ware, 188; 1 Miller (Lou.) 259. 539.

from the common law rule that the obligation incurred goes to the whole extent of the injury sustained, whether the liability arises *ex contractu* or *ex delicto*.

The covenant in charter-parties, whereby the owner binds the ship, and the charterer binds the cargo for the due performance of the terms of that instrument, is in almost universal use in the commercial world. Though the right of lien for freight does not depend upon any especial agreement to pay freight, and though our courts have so completely carried into practice the maxim that "*Le batel est obligé à la marchandise et la marchandise au batel*" that they tacitly annex this as a covenant to every contract for the carriage of goods, yet it is often of consequence to ascertain what legal effect is attached to such a clause. The English cases deny that such a clause creates a lien for general security for the performance of the covenants contained in the charter-party, or that it gives either party a right to detain for any cause which he could not have done in the absence of such a clause.¹ The reason which appears to have been most cogently urged for such a doctrine seems to be, that because there was no active remedy by process *in rem* provided in all cases, no passive remedy by way of simple lien is allowed to either party, on account of the insertion of this binding clause into the charter-party. In our country where the admiralty jurisdiction is not confined within the same narrow limits,² a clause in the contract of charter or transportation, whereby the parties respectively bind the goods and vessel for the due performance of the covenants, payments and agreements thereof, is held to be a valid clause. It creates a lien on the goods for such performance and may be enforced against the goods or ship by detention and a suit in the admiralty.³ In the leading case of the *Volunteer*, (cited *ante*) it was decided that such words were intended to create and reserve a lien by specialty, and should be so interpreted; that the words are sensible where they occur, the parties competent to contract, and as the terms of the agreement have in the maritime law a clear and determinate meaning, it is the duty of the courts to interpret

¹ 3 M. & S. 205.

² *De Lovio vs. Boit* 2 Gall. 398.

³ *The Volunteer*, 1 Sumn. 551; 6 Pick. 252.

the contract so as to secure to the parties, the very rights and remedies which they intended to guaranty to each other.

Thus it will be seen that many of the old customs and statutes concerning lien have been revised and improved. Profiting by the common experience of nations and often disciplined by the tuition of alarming emergencies, it is thought that in this change mere innovation has been rejected, while fast hold has been laid upon all the means of essential and permanent progress. We have in so far advanced in the theory of international morality, and the active observance of the rules of justice among States, that instead of being burdened on this subject with an array of commercial usages which form merely what Azuni termed "a chaotic mass of scholastic disquisitions," we recognize a series of comely and universally practical marine regulations, which though subject to various modifications according to the different requirements of each nation, are by virtue of their very nature identical in all. Embracing, as this branch of commercial regulations does, the greatest public and private interests, it is imperatively necessary that amidst the circumstantial variety of its regulations, essential unity should still be preserved, and that every where, the law of maritime liens should be administered with a view to the public policy, and in the spirit of ample and substantial justice. Of the admiralty jurisdiction of these States, it may well be said, that they have so enlarged and increased the once meagre and unsatisfactory privileges of lien; have rendered their courts so easily and universally accessible, and have above all, so thoroughly adapted their process and decrees to commercial usages and wants, that now, either party may upon application, have meted out to him almost that perfect justice, which is administered "freely and without purchase; completely and without denial; speedily and without delay."

RECENT AMERICAN DECISIONS.

Michigan, June Term, 1856.

DANIEL O'CALLAGHON, CLAIMANT vs. JOSEPH RIGGS.

1. A maritime lien on a vessel is paramount to a domestic lien, under a statute of a State, of subsequent date. And if a judgment and sale take place under the statutory lien, it will not displace or affect the prior lien.
2. The vessel in the hands of such purchaser is subject to the prior lien.
3. As the liens set up are distinct, the plaintiffs being different, neither of these suits can be pleaded in abatement to the other.
4. Neither claimed the vessel, but a lien on it.
5. The purchaser under the statute lien, could not object to the jurisdiction of the admiralty court as the suits and rights of the parties are distinct.

Alfred Russell, for libellant.*Simon Towle*, for appellant.

MCLEAN, J.—This is an appeal in admiralty. Riggs, a citizen of Michigan, filed his libel June 25th, 1855, for supplies furnished the schooner John Richards, in a home port. Among other intervening libellants, J. Braymon, a citizen of Ohio, a material-man, filed his libel in the District Court, September 8th, 1855. The marshal seized the vessel and made the usual return, "held in custody until the further order of the court." No person interposed a claim. Proclamation was made, order of reference, &c, and the vessel was condemned and sold the 24th of December, and the claimant became the purchaser.

The respondent's title is set up under a bill of sale from the sheriff of the county of Wayne. This sale was founded on a procedure of a Circuit Court commissioner under the 122d chapter of the Revised Statutes of Michigan, of 1846, for the enforcement of a lien on the vessel for repairs, &c., at the home port. The lien under which the libel was filed, was prior to that at the home port, and was incurred at Toledo, in the State of Ohio, which was a foreign port, in a procedure of the admiralty.

The vessel was seized by the sheriff before it was taken into custody by the marshal, of which the marshal had no notice, and the sale of it by the sheriff was prior in time to the sale of the marshal, both being made on the 24th of December, 1855.

A question was made and argued at the hearing, as to the admissibility of certain papers, to show the procedure before the commissioner. If the proceeding of the commissioner was legally a matter of record, the proof would be defective; but from the view I take of the case, it is unnecessary to decide this question.

The first section of the act gives a lien against all vessels which navigate the waters of the State, for supplies, repairs, &c. After the seizure of the vessel, twelve weeks' notice is to be given, and all persons who have any demands against such vessel, "under the provisions of this chapter are required to deliver an account of their respective claims, to the officer within three months from the publication of notice, and any lien, under the statute, if not presented within the time, ceases.

This proceeding is in the nature of an attachment, in which all the creditors under the act, may come in and prove their debts; and if bond and security shall be given to pay the creditors, the vessel shall be released. The 7th section of the act declares, that a second warrant shall not issue against the same vessel. The 36th section provides, that the procedure shall not be instituted against any vessel which has been seized under process of the courts of the United States, nor against any vessel which has been sold by order of such courts, except claims which originated subsequent to such sale."

That there is under the maritime law, a lien on the ship for materials furnished or repairs, is too well established to be controverted. And that this lien does not depend upon the possession of the vessel, as a common law lien, is also clear. In the case of the *General Smith*, 4 Wheat. 443, Curtis, 440, the court held that, this lien did not attach to the home port of the vessel. This was a distinction not found in the maritime code, and was no doubt adopted from deference to State regulations. Still a domestic lien at the home port of the vessel, may be enforced under a maritime jurisdiction.

It is conceded in the case, that the lien of the libellant was prior to the lien of the respondent, under the Michigan statute. But as the property was first seized under the statute, it is contended that the subsequent seizure by the marshal was illegal, and consequently that the District Court had no jurisdiction of the case.

No procedure under the statute of seizure or sale, could affect the lien of the libellant. The claim of the respondents was distinct from that of the libellants. The sale of the sheriff was subject to the prior lien. In the hands of the purchaser under the sheriff, the vessel was liable to the claimant, and he could have enforced his lien.

The statute provides that all claimants may come in, as under an attachment, and have their rights adjusted. But this is limited to claims under the statute, and did not embrace the claim of the libellant. All liens under the statute, which are not presented are barred expressly by it. No one, it is supposed, will contend that the statute embraces a maritime lien; or that the legislature had power to regulate such a lien. The rule is different in a court of admiralty. All who have an interest in the vessel may come in and be made parties and their rights will be protected. In the present case, the respondent could have exhibited his claim, and it would have been decreed, subject to the satisfaction of the prior lien. But the respondent did not intervene, though he had actual notice of the admiralty procedure. He stands upon his purchase under the sheriff's sale, which did not displace the lien of the claimant. Such sale was no bar to the libel suit, and consequently the title of the respondent is unsustainable against that of the libellant.

The force of the respondent's right must rest on the alleged illegality of the procedure by the marshal. The principle is admitted, that where there is a concurrent jurisdiction, the pendency of the suit may be pleaded in abatement in the suit subsequently commenced. But in these cases there is no conflict of jurisdiction. The suits are distinct, by different plaintiffs, and for distinct causes of action. The only thing common to both actions is, a lien of each on the same vessel. But here there is no conflict, as all must admit that the prior lien must be first satisfied; and that the claimant by the first lien is not disputed.

No impropriety is perceived in the arrangement between the marshal and the sheriff, to hold the property, under the circumstances, subject to the right of the parties. Neither party claimed the vessel, but an interest in it, which was a mere lien, and the only question is, whether the maritime court had jurisdiction. If it had, there is an end to the controversy, as it proceeded on the paramount lien. There is nothing on the face of the record to raise a doubt as to the jurisdiction. No plea was filed to the jurisdiction, and the facts stated on the record show affirmatively, that there was jurisdiction. In such a case, the truth of the record cannot be questioned, nor its irregularity.

The decree of the District Court is affirmed, with costs.

In the District Court of the United States for the District of Missouri.—September, 1856.

HILL & CONN AND OTHERS vs. THE GOLDEN GATE.

1. It is settled that there can be no lien by the general maritime law for materials and supplies furnished a vessel in her home port.
2. The question whether a vessel is a foreign or domestic one depends not on her enrollment, but upon the residence of her owners.
3. Where there is a charter-party, the charterers having exclusive control of the vessel will be deemed the owners and alone are responsible for damages and contracts.

The opinion of the court, in which the facts appear, was delivered by

WELLS, J.—The steamer Golden Gate was owned in Indiana, and enrolled at Louisville, Kentucky.

The owners chartered her to certain persons who resided at St. Louis, Missouri.

By the terms of the charter-party the charterers were to have the boat for four months, with a privilege to renew the charter party, upon a specified notice, for four months more. The charterers were to pay the owners \$800 per month for the hire of the

boat, and were to have the entire and exclusive control and management of her for the time specified—were to receive her earnings, and keep her clear of all liens and claims. The charterers appointed the master, ran the boat, and during the charter-party contracted debts in Missouri for materials and supplies, a part of which were furnished by the libellants, and are the same for which the libels in this case are filed. Other libellants furnished materials and supplies before the boat was chartered.

The principal question for the court now to examine and decide is, have the libellants in this case a lien upon the boat by the *general maritime law of the United States* for the materials and supplies thus furnished?

If materials and supplies be furnished to a vessel in a port of the State to which she belongs, material-men have no lien by the general maritime law—the presumption being that the supplies are furnished on the credit of the owners, and not on that of the boat. On the contrary, if the materials and supplies be furnished to a foreign vessel, that is a vessel belonging to a foreign country or to another State, then a lien is given on the vessel by the general maritime law—the presumption being that the material-men looked to the vessel as well as to the owners for security. There may be a lien on a vessel for materials and supplies furnished in a port of the State to which she belongs, but in such case it is given by the local law of the State. 1 Conkling's Ad. 56, and pages following. In regard to these principles there is no controversy.

The question whether the Golden Gate is subject to a lien by the general maritime law for supplies furnished in St. Louis, after the charter-party was entered into, will depend for an answer on her being then in a foreign or domestic port. Does her being a foreign or domestic vessel depend on the *residence of her owners*, or on the port of her *enrollment*?

As a general rule—which general rule, however, is subject to some modifications and exceptions—it depends on the residence of her owners—or those who are, for the time, to be deemed and treated as her owners.

If it depends on the residence of her owners, then the next ques-

tion will be, who are to be deemed and treated as her owners in this case? Are they the general owners residing in the State of Indiana, or the charterers residing in St. Louis, Mo.

That the Supreme and Circuit Courts of the United States look to the residence of the owners and not to the place of enrollment of a vessel, to determine her character, will be apparent by examining the decided cases. The residence of the owners is proved and stated, and nothing is said about the enrollment. See the statement of the case and opinion in *The General Smith*—4 Wheat. R. 438. *The brig Nestor*, 1 Sumner's Rep. 75, where Judge Story says: "*Prima facie* the supplies of material-men to a foreign ship, that is to a ship belonging or represented to belong to *owners residing* in another State or country, are to be deemed to be furnished on the credit of the ship and the owners until the contrary is proved." Statement of the case and opinion in *The barque Chusan*, 2 Story's Rep. 456.

If the character of the vessel, (foreign or domestic,) depended on the *enrollment* and not on the *residence* of the *owners*, the statements and proof of the *residence of owners*, and the language of Judge Story in the case of *The brig Nestor*, were idle and unimportant, and as nothing was said or proved about the *enrollment*, there could be nothing by which to determine the character of the vessel.

It is important to observe that the character of the vessel is only referred to for the purpose of ascertaining to whom and to what the credit is given; and in no other respect, so far as regards this case, is it important. If the owners reside in a foreign country or in another State, the material-man is presumed to give credit to the boat and also to the owners—because he is presumed not to rely alone on the owners who live so remote and who are beyond the jurisdiction of the courts of his State. If the owners reside in the same State with the material-man, the latter can easily resort to them for payment and readily enforce it in the courts; therefore he may well be supposed to give credit to the owners alone.

It is apparent, therefore, that the *place of enrollment* has nothing to do with the *credit* that is given; and has, therefore, nothing to do with the question of *lien*.

If the material-men were ignorant of the place of residence of the owners, they might presume, and I think the presumption would be reasonable, that the owners resided at or near the port where the vessel was enrolled, but in this case there is no room for presumption, as it is admitted that the libellants knew when the supplies were furnished, that the general owners resided in Indiana, and the charterers in St. Louis, and that the boat was enrolled at Louisville.

I am aware of the case of *Free vs. The Indiana*, (Crabbe, 479.) and that it decides that a vessel is to be deemed to belong to the port where she is enrolled. It is founded solely on the third section of the act of 31st December, 1792, entitled "an act concerning the registering and recording of ships or vessels," (1 Lit. & B. Laws U. S., 288.) That section provides "That every ship or vessel hereafter to be registered, (except as hereinafter provided,) shall be registered by the collector of the district in which shall be comprehended the port to which such ship or vessel shall belong at the time of her registration, which port shall be deemed to be that at or nearest to which the owner, if there be but one, or if more than one the husband or acting and managing owner of such ship or vessel usually resides."

The substance of the section is that the vessel is to be registered at the port to which she belongs; and *for the purpose of registry*, the port to which she belongs shall be deemed to be that at which the owner resides, or the port nearest to which he resides. The section is only directing at what port the vessel is to be registered, and has no other effect. It frequently happens, as it happens in this case, that the owners reside in one State, and the port nearest to them is in another State—and this is especially the case on the Ohio and Mississippi rivers, which divide States.

The above act relates to registering vessels—those engaged in foreign trade. - But a subsequent act, (Feb. 18, 1793—1 Lit. & B., 305, § 2.) providing for the *enrollment* of vessels, (those engaged in the coasting trade,) expressly provides that the place of abode of the owners shall be stated in the enrollment.

According to the late and well considered case of *Dudley and others vs. The Steamboat Superior*, (American Law Register for

August, 1855,)¹ which reviews the above case in *Crabbe*, the place of enrollment is only prima facie evidence of the port to which the vessel belongs. See also *Sharp vs. United Ins. Co.*, 14 Johns. R., 201; and *Leonard vs. Huntington*, 15 Johns. R., 302.

It will be observed that when the port or place to which a vessel belongs is spoken of, it always means the port or place where the owners reside to whom the vessel belongs.

I have before remarked in this opinion, that the rule that a foreign vessel was subject to a lien for supplies, and that a domestic vessel was not thus subject, under the general maritime law, was not without exceptions and modifications; but it will be seen that those exceptions and modifications all show that the lien depends on the residence, or supposed residence, of the owners, and not on the place of enrollment.

Thus, if the owners of a domestic vessel held out their vessel as a foreign vessel—that is, as belonging to persons residing in a foreign country—they are precluded by their own act from denying her foreign character, when libelled by material-men; and there will be a lien for the supplies furnished enforced in the admiralty. *The St. Jago de Cuba*, 9 Wheat. R. 416, 17.

Again. If an exclusive credit be given to the master, there is no lien, although she be a foreign vessel. *The brig Nestor*, 1, Sumner's Rep., 75.

Again. If the contract be made with the owners personally and not with the master, there is no lien—the presumption being that the credit was given to the owners personally, and not on the credit of the vessel. *The St. Jago de Cuba*, supra.

The act of Congress of the 3d of March, 1851, (9 Lit. & B. 635) entitled, "An act to limit the liability of ship owners and for other purposes," section 5 provides, "That the charterer or charterers of any ship or vessel, in case he or they shall man, victual and navigate such vessel at his or their own expensæ, or by his or their own procurement, shall be deemed the owner or owners of such vessel, within the meaning of this act; and such ship or vessel, when so chartered shall be liable in the same manner as if navigated by the owner or owners thereof."

¹ Volume iii. page 622.

The above section applies, I presume, only to certain losses and injuries specified in the act, and moreover is declared not to apply to inland or river navigation; the last, as I suppose, was because the general maritime law of the United States was not at that time (March, 1851) thought to apply to the inland navigation, the decision of the Supreme Court of the United States declaring it to extend to inland navigation, not having, at that time been made. But it applies in many cases, and to all navigation except the inland navigation; and shows that the place of *enrollment* can have nothing to do with it. And so far as the act provides, it shows the opinion of Congress that the charterers are to be, and ought to be considered the owners.

Having established, as I think, the proposition that the lien in favor of material-men under the general maritime law depends on the residence of the *owners*, and not on the place of *enrollment*, it becomes necessary to inquire who, in this case, are to be deemed the owners.

The law, I think, is perfectly well settled, that where there is a charter party, and by its terms the charterers, as in this case, are to have exclusive possession, control and management of the vessel during the term specified—are to appoint the master, run the vessel, and receive the entire profits, *they*, and not the general owners, *are to be deemed the owners*, and are alone responsible for damages and contracts. *Gracie vs. Palmer*, 8 Wheaton's R., 632-3; *MacCardier vs. The Chesapeake Ins. Co.*, 8 Cranch's R., 39; Abbott on Shipping, note 1 to page 57 of the English edition, and cases there cited; *Ibid*, 288-9, same paging and note; *The schooner Volunteer* and cargo, 1 Sumner's Reports, 566-7; *Kleine vs. Catara*, 2 Gallison's Rep., 75.

Indeed, upon principle as well as authority, there cannot be a doubt. It might as well be contended that if you hire your horse to another to perform a journey, *you*, and not *he* would be responsible for his shoeing and food.

It was said in the argument of this cause, that the charter-party was not recorded. This can make no difference, as the only effect of recording would be to give notice of its existence—there being

no act of Congress declaring it to be void for want of recording and the material-men expressly admitting that they knew of the charter-party when they furnished the supplies. Abbott on Shipping, page 33, of English ed., and note 1 to that page, and cases there cited. There is an act of Congress, (9 Lit. & B., 440) entitled "An act to provide for Recording the Conveyances of Vessels, and for other purposes." But it does not extend to charter-parties; and the instruments which the act requires to be recorded, are not declared invalid as to those having actual notice thereof.

I come, therefore, to the conclusion, that for supplies furnished the Golden Gate at St. Louis, after she was chartered, the material-men and the charterers both residing there at the time, there is no lien upon the vessel by the general maritime laws of the United States.

In the District Court of the United States, for the District of Missouri—September, 1856.

ASHBROOK AND OTHERS vs. THE GOLDEN GATE.

1. The courts of the United States have jurisdiction in all civil causes of admiralty jurisdiction and have it exclusive of the courts of the several States, except as to the common law remedy.
2. A lien given by the general maritime law is a vested right, and the legislature of a State can pass no law to impair it.
3. A material-man who has a lien under the general maritime law of the United States has a right to enforce that lien in the Federal courts, and State laws, or proceedings under them, cannot deprive him of that right.

The opinion of the court was delivered by

WELLS, J.—In this case certain of the libellants had liens under the general maritime law of the United States; and others had liens under the statute of Missouri, entitled "an Act concerning

boats and vessels," (Digest Laws of Missouri, 1845, page 180.) Those having liens under the general maritime law, furnished supplies in Cincinnati, Ohio, where they resided at the time, and whilst the boat was owned in Missouri; others resided in Missouri, and furnished supplies whilst the boat was owned in Ohio.

Those having liens under the State law, resided in Missouri and furnished the supplies there, the boat at that time being also owned in Missouri.

After the supplies were furnished, the boat was sold under the provisions of the above cited statute of Missouri; and the question now raised for the consideration of the court is, were these material-men divested of their several liens by not intervening in the State Court, or by the proceedings in the State Court? It is a question of delicacy, as the decision of it may conflict with State laws; but I am compelled to decide it.

The provisions of the statute of Missouri make no distinction in terms between vessels owned by citizens or subjects of foreign nations, or citizens of other States of the Union, and those owned by citizens of Missouri.

They apply to "every boat or vessel navigating the waters of this State." See the act, section 1, and to "contracts made *within this State* with boats used in navigating the waters of this State." See the case of *James, respondent vs. The Steamboat Pawnee*, 19 Missouri Rep. 517.

If I understand correctly the language of Judge Story, he entertained the opinion that similar provisions in the statutes of the State of New York, could not properly be construed to apply to any but domestic boats or vessels—that is, those owned in New York. (*The Barque Chusan*, 2 Story's Rep. 461-2.) But the Supreme Court of Missouri makes no distinction between foreign and domestic vessels. (*James vs. The Pawnee, supra.*)

The case now under consideration differs from that of *The Henrietta*, decided by this court at the March term, 1856. In that case the boat was owned in Missouri, and the supplies were furnished in Illinois. I held that the case did not come within the

provisions of the steamboat law of Missouri, because the vessel was not, at the time the contract was made for the supplies, "navigating the waters of this State;" nor was the contract made or supplies furnished "within this State," and, therefore, the lien obtained in Illinois under the general maritime law, was not divested by the sale in Missouri. But much of the reasoning in that case is applicable to this case, and will not be here repeated.

Is the admiralty and maritime jurisdiction *in rem*, exclusively in the United States courts? When I wrote the opinion in the case of the *Henrietta*, I had never known it questioned; but in a recent decision by the Supreme Court of Ohio, it is questioned and denied. (See *Thompson vs. Steamer G. D. Morton*, 2 Warden's Ohio State Reports, 26.) That court appears to think that the provisions of the 9th section of the judiciary act (of Congress) makes the jurisdiction of the District Courts exclusive only as relates to the Circuit Courts of the United States. In that opinion I cannot concur.

The 9th section of the judiciary act (1789) declares that the District Courts of the United States shall have, in certain cases specified, 1st: Jurisdiction (or cognizance) exclusive of the courts of the several States. 2d: In other cases, jurisdiction concurrent with the courts of the several States, or the Circuit Courts of the United States, as the case may be. 3d: And in other cases, exclusive original cognizance, without mentioning any other courts, either Federal or State; and this last includes all civil causes of admiralty and maritime jurisdiction, including certain seizures on water, "saving to suitors, in all cases, a common law remedy, where the common law is competent to give it;" and a like cognizance in other cases of seizure without any saving.

In the first class of cases (as I have arranged them) the jurisdiction is not declared to be exclusive except as to the State Courts; and there is, therefore, an implied exception as to the jurisdiction of the Circuit Courts of the United States.

In the second class, the grant is not declared to be exclusive, but concurrent, and the jurisdiction both of the courts of the several States and the Circuit Courts of the United States is excepted.

In the third class there is no exception of the exclusiveness as to

either the courts of the several States or the Circuit Courts of the United States, except as to the common law remedy in the first branch of that class, and without that exception as to the other branch.

So that, in the third class, which includes the admiralty and maritime jurisdiction, there is no exception except that of the common law remedy, as to the exclusiveness of the original jurisdiction in the District Courts. It is absolute, unconditional and exclusive. But the grant of exclusive *original* jurisdiction to the District Courts, does not exclude the *appellate* jurisdiction of the Circuit Courts, which is also provided for in the 21st section of the same act. This seems to me conclusive.

Again. As to all other matters mentioned in the third class, there never has been any doubt as to the jurisdiction being exclusive as to the State Courts. Why then is it not exclusive as to the admiralty and maritime jurisdiction? The same language is used as to all.

The Supreme Court of the United States, (Judge Marshall delivering the opinion) in the case of *Slocum vs. Mayberry*, 2 Whea. 9, expressly decided that the jurisdiction of the United States courts, as to seizures on land and water, is exclusive of the courts of the several States; this is embraced in the second branch of the third class above. In the case of *Galston vs. Hoyt*, 3 Whea. 246, the question in the Supreme Court of the United States is put beyond all dispute. The court is discussing the question of the exclusive jurisdiction of the United States courts, *as it regards the State courts*, and declares that, "By the judiciary act of 1789, ch. 20, § 9, the District Court are invested with *exclusive* original cognizance of all civil causes of admiralty and maritime jurisdiction, and of all seizures on land and water, and of all suits for penalties and forfeitures incurred under the laws of the United States."

Similar phraseology is used in the 11th section of the judiciary act, which gives the Circuit Court "exclusive cognizance of all crimes and offences cognizable under the authority of the United States, except where this act otherwise provides or the laws of the United States shall otherwise direct"—without mentioning the

State courts; yet no one has ever doubted that the jurisdiction here given, was exclusive of the State courts. See also 1 Conkling's Ad. 349.

The opinion, (excepting so much as regards the effect of the 9th section of the judiciary act) given by the Supreme Court of the State of Ohio in the case above cited—and the opinion expressed by that court in the case of *Keating vs. Spaik*, 3 Warden & Smith's Ohio Rep., do not apply to the case I am considering, although they deny exclusive jurisdiction *in rem* to the United States courts in admiralty causes. The cases in which those opinions were delivered, arose and had to be decided under the act of Congress of the 26th of February, 1845, 5 Lit. and B. 726, which applies only to the lakes and their connecting rivers, and which not only saves the common law remedy, but also "any concurrent remedy which may be given by the State laws."

1st.—Let us now see how the matter stands. The courts of the United States have cognizance of all civil causes of admiralty and maritime jurisdiction, and have it exclusive of the courts of the several States, except as to the common law remedy.

2d.—This is a civil cause of admiralty and maritime jurisdiction.

3d.—The libellant has a lien given by the general maritime law of the United States; it is as much a vested right as that of a mortgage. It is a contract which the legislature of a State can pass no law to impair. *Bronson vs. Kinzie*, 1 How. 311.

4th.—The party having this lien is entitled to sue in the United States court in admiralty, to enforce it. This right is given by the laws of the United States.

5th.—The laws of the United States are supreme over State laws.

6th.—A State law comes in and declares that the party having this lien shall either sue in the State courts (under the "act concerning boats and vessels,") or lose his lien.

Can it be possible such State law is valid? The United States law and the State law cannot both be enforced. The first gives the party a right to sue in the United States courts and there to establish his claim and obtain the enforcement of his lien; the second

declares that if he does not sue in the State court—that is, if he sues in the United States court, he shall get nothing.

I refer to the case of *Shelby vs. Bacon, et al*, 9 How. 69, 70, 71, to show that where a person has the right to sue in the courts of the United States, no State law, and the proceedings of no State tribunal can deprive him of that right. It is substantially as follows: The Bank of the United States, after obtaining a charter from the State of Pennsylvania, failed. It made assignments of its assets under the laws of that State. The assignees, according to those laws, were to receive and collect the assets and allow debts and pay creditors; all under the control and jurisdiction of the Court of Common Pleas of that State. If creditors did not exhibit their claims and get them allowed, they obtained no part of the assets of the bank.

A creditor who resided in Kentucky brought suit in the Circuit Court of the United States. The assignees pleaded to the jurisdiction of the court. The case went to the Supreme Court of the United States. That court held that the plaintiff, as a citizen of another State, had a right to sue in the courts of the United States, and the State law could not deprive him of that right. The court says: "To establish this claim as against the assignees, the complainant has a right to sue in the Circuit Court (of the United States,) which was established chiefly for the benefit of non-residents." "On the most liberal construction favorable to the exercise of the special jurisdiction, the rights of the plaintiff, in this respect, could not, against his consent, be drawn into it." "Citizens residing, perhaps, in a majority of the States of the Union, are debtors or creditors of the bank. It is difficult to perceive by what mode of procedure the State of Pennsylvania can obtain and exercise an exclusive jurisdiction over the rights of persons thus situated."

It appears to me that if a person having a lien under the general maritime law, cannot resort to this court—a court of exclusive jurisdiction in admiralty cases—because of the provisions of the State laws and proceedings under them, then the whole subject is reversed, and the State courts have the exclusive jurisdiction; and in

that way the entire jurisdiction, in all cases, of the courts of the United States, might be absorbed by the State courts. I am speaking of the effect of such laws, not of the motives or intentions of the legislature in passing them; for to do the legislature of Missouri justice, the steamboat laws were enacted some sixteen years before it was understood that the United States courts had jurisdiction of cases arising out of our inland navigation upon the public rivers of the United States.

The act of Congress, section 9, above referred to, saves to suitors the right of a common law remedy, when the common law is competent to give it. It is a *common law remedy*, as distinguished from a remedy in the Admiralty or in Chancery.

This common law remedy existed before the constitution and act of 1789, and is, by the latter, *saved*, not *given*. 2 Brown's Civil and Admiralty Laws, 111, 112.

But a common law *remedy* is a remedy by *action* at common law, and is not a proceeding *in rem*, or against the vessel itself. Ibid, and note 53 to page 111.

Courts of common law do not proceed *in rem*. *Percival vs. Hickey*, 18 Johns. R. 292; *Waring vs. Clarke*, 5 How. R. 461; *Clarke vs. New Jersey Steam Navigation Co.*, 1 Story's R. 538-9; 1 Kent's Com. 378, (2d ed.) Opinion of Mr. Justice Catron in *Waring vs. Clarke*, *supra*, and therefore a proceeding *in rem* cannot be a common law remedy.

The common law is competent to give a remedy in many cases, which are cases of admiralty and maritime jurisdiction. Thus a material-man may proceed in admiralty either against the vessel *in rem*, or against the owners in personam, or against the master in personam. He has also his remedy at common law, which would be an action of debt or assumpsit against the owners—or a like action against the master for the value of the supplies furnished.

In some, if not all cases of collision, where a party injured could maintain a suit *in rem* in the admiralty, he could also maintain an *action of trespass* at common law. *Percival vs. Hickey*, *supra*.

So an action of trover will lie in many cases of a wrongful dis-

possession of vessels—although there is a remedy also in the admiralty.

Why are suitors, not suing in the admiralty but in the State courts, limited to a *common law remedy*, and are not authorized to proceed *in rem*?

The proceedings against ships and vessels affect the citizens and subjects of foreign nations, as well as the citizens of the several States; and it is important that the principles and rules for determining rights and injuries, and the courts to administer them should be those known to the law of nations; and those principles and rules should be uniform throughout the United States—so also of the remedies.

If the courts and officers, including justices of the peace and constables, of the several States, can proceed *in rem*, against the vessels of other States, so they can against foreign ships and vessels—and thus ships would be seized, voyages would be broken up, the United States involved in difficulties and reclamations with foreign nations; a multiplicity of laws, rules and proceedings, contradictory and inconsistent with each other in the several States, be introduced; and thus the exclusive right and jurisdiction of the United States over our foreign relations, and over the commerce and navigation of the United States, both foreign and domestic, would be interfered with and rendered impracticable. And the States themselves would soon get into conflicts of jurisdiction and laws, and resort to laws retaliatory and vexatious upon the shipping of each other, as was the case before the adoption of the federal constitution.

It must be remembered, also, that the navigable rivers of the United States are not the exclusive property of any State or States, but are common to all. Benedict's Ad. 114. And that vessels navigating those rivers are enrolled and licensed by the United States, and that such license imports full power and authority to navigate them; and no other authority is necessary.

In relation to the authority of the U. S. Courts and the State courts in admiralty cases, see *The Spartan*, Wares' Reps. 147; *Certain Logs of Mahogany*, 2 Sumner's Rep. 502; *Wall vs. The*

Royal Saxon, 2 Am. Law Reg. 324; 1 Haggard's Ad. R. 298; *The Flora vs. The Globe*, Am. Law Jour. for February, 1851.

I do not find any reported case in which is satisfactorily discussed and decided the question how far, under the 9th section of the Judiciary act, the courts of the several States have jurisdiction to proceed *in rem* against ships and other vessels enrolled or registered and licensed under the laws of the United States. I find cases decided, which arose under the act of 1845, extending a QUASI admiralty jurisdiction to the lakes and their connecting rivers; which are, as already shown, not applicable to the commerce and navigation on other rivers. Some other cases speak of a concurrent remedy at common law, and say that the jurisdiction of the courts of the United States is not exclusive.

This is all true, because the common law remedies are saved; but they do not discuss the legality of a proceeding in the State Courts *in rem*, and how far it is affected by the 9th section of the Judiciary act.

It was said in the case of *The ship Robert Fulton*, (1 Paine's Rep. 420) that under the law of New York, a somewhat similar statute to that of Missouri, the State courts proceed *in rem*, and have a concurrent jurisdiction. After a most careful, and I may say, laborious investigation of the subject, I cannot discover on what principle that opinion can be maintained. The court merely says: "That the State tribunals had authority also to enforce the lien (given by the statute of New York) in the present case, is very certain, *free from the express provisions of the law* (of New York.) There was then, a concurrent jurisdiction in the two courts, and the proceedings under the State authority were, *in the nature of proceedings, in rem.*"

Now, with the greatest respect for the opinions of the learned judge who delivered the above opinion, it appears to me that the concurrent jurisdiction *in rem* of the United States and State courts, cannot depend on the statutes of the *State*, but on those of the United States.

Let us examine carefully and critically the language used in the

Constitution of the United States, and also that used in the 9th section of the Judiciary act. It will aid us in the investigation.

The Constitution declares that "The Judicial power shall extend to *all* cases of admiralty *and* maritime jurisdiction." The 9th section of the act declares that "The District Courts of the United States shall have *exclusive* original cognizance of *all* civil causes of admiralty and maritime jurisdiction." "Saving to suitors, in all cases, the right of a *common law remedy, where the common law is competent to give it.*"

It has been said that, perhaps there has never been in the United States a law more carefully and ably digested, than that of 1798. In this opinion I fully concur. It has remained almost untouched for sixty-seven years. It originated in the Senate, which then possessed men of eminent ability, several of whom were distinguished members of the Federal Convention. Oliver Ellsworth, afterwards Chief Justice of the Supreme Court of the United States, was chairman of the committee to whom the subject was referred, and who is said to have prepared the bill.

Observe, the only exception to the *exclusive* cognizance is, *not* a remedy in the common law courts, but a common law *remedy*. The *remedy* is to be the *common law remedy*, no matter in what State Court it may be sought, or what may be the system under which the court may proceed. There is also a qualification of this saving of a common law remedy. It can be only in a case "where the common law is competent to give it." This qualification was, doubtless, intended to cut off new remedies which might be devised, but which were unknown to the common law. For, if the *common law* was not competent to give the remedy sought, then the party could not resort to any other, but must sue in the United States Court in Admiralty. A suitor cannot therefore say "a common law remedy is saved to me, and if there be none to effect my object, (the *seizure* of a vessel) I can use any the legislature may have devised for my case."

What, then, is the common law remedy spoken of in the ninth section? In my judgment it can be only common law *actions*—actions of debt, assumpsit, case, trespass, trover, &c., as known

and practiced at the common law. Such are the only common law remedies then, or indeed now known; and these, in many cases, are proper remedies and such as the common law is competent to give. But a proceeding by bill in equity is unknown as a common law remedy; and a proceeding *in rem* is unknown as a common law remedy. What lawyer ever knew or heard of a proceeding *in rem* as a common law remedy? Even the actions of detinue or replevin have in them nothing of the nature of proceedings *in rem*. Each requires a plaintiff and defendant who are *persons*, and the judgments bind no one but parties and privies. True, a proceeding *in rem* may be used in common law courts of the States, but in all such cases it is given by *statute*, or is a proceeding under the *civil law*. And the fact that it is given by statute, and did not exist before the statute which gave it, in States where the common law prevails, shows that it had no existence as a remedy at the common law. I do not speak of modifications and improvements of actions at common law, which may doubtless be made by the Legislatures, and still be within the meaning of the ninth section, but the proceeding *in rem* is given originally and entirely by statutes, where it exists in common law courts, and is not merely modified and improved.

When a court has jurisdiction to proceed *in rem*, and does so proceed, its judgments are binding and conclusive on the whole world, and this is so, whether the tribunal be foreign or domestic. *The Mary*, 9 Cranch R., 126.

Not so with judgments at common law: they bind only parties and privies.

If the State courts can have jurisdiction in admiralty cases, conferred on them by State statutes, to proceed *in rem*, so they can to proceed in equity, and this would constitute them to all intents and purposes, courts of admiralty; and this jurisdiction can be, and in many cases is given by the State laws to justices of the peace, and to constables as their ministerial officers. If there is an average of fifty counties to each State, and twenty justices of the peace to each county, we should then have in these United States, thirty-one thousand courts of admiralty and maritime ju-

risdiction, to say nothing of the courts of record. These courts proceeding against and seizing and selling vessels of foreign nations, and those of sister States, and although they would have all the powers of courts of admiralty, yet they would, in but few instances, proceed according to the maritime law, which is part of the law of nations, nor according to acts of Congress (for Congress can pass no law regulating proceedings in the State courts;) but they would proceed according to the statutes of the several States, and usages that would there prevail, each State having a different system. The effect of this must be, it appears to me, to embroil the United States with foreign nations, and the several States with each other, and to produce retaliatory laws and proceedings, and endless conflict, uncertainty and mischief. And this, I repeat, would render nugatory the provisions of the 9th section of the judiciary act of 1789; and the power of Congress to regulate commerce and (navigation as incident thereto) with foreign nations and among the several States. If I am right in the views above expressed, there can be no concurrent jurisdiction *in rem* in admiralty cases between the United States courts and the courts of the several States.

I do not, however, consider the proceeding in the State courts of Missouri against boats and vessels, as *strictly* a proceeding *in rem*. It is, it appears to me, a proceeding devised for suing the owners; but instead of using the name of the owner, it uses that of the boat. In some cases, arising under the act, a judgment is rendered against the boat for the demand of the plaintiff only, execution thereupon issues, and only enough is collected to pay the plaintiff's judgment and costs; and there is consequently nothing to distribute among other creditors or claimants. In no case can creditors, material-men, and others, although having valid liens, intervene and have their claims adjudicated and get any part of the proceeds, unless the contract for supplies, &c., was made within this State, and the boat at the time navigating this State. *James vs. The Pawnee*, 19 Mo. R., 517. So I presume, it would be as to the other contracts, and as to injuries specified in the act. Such proceedings do

not look much like proceedings in admiralty, or proceedings *in rem*. See the opinion of this court in the case of *The Henrietta*.

Be this as it may, I could not give to those proceedings the effect which is given to proceedings strictly *in rem*.

I am, therefore of opinion that the material-man who has a lien under the general maritime law of the United States, has a right to enforce that lien by a suit in the United States court; and that the State law and proceedings under it, given in evidence in this case, do not deprive him of that right. *The barque Chusan*, 2 Story's Rep. 462; *Certain Logs of Mahogany*, 2 Sum. R. 592. But how is it with the material-man who has no lien under the general maritime law, but has a lien under the State law?

The subject is not without its difficulties; but I think that as the lien is given by the State law, the State law may divest it. If he *takes* under the State law, he must *hold* under the State law. He takes his lien subject to all the provisions for divesting it contained in State laws passed anterior to his lien. He takes *cum onere*, *Bronson vs. Kenzie* and another, 1 How. R. 311. *The barque Chusan*, 2 Story's R. 462. The statute which gives the lien—and which is the only law which gives him a lien—provides for certain judicial proceedings by which the vessel may be sold and the lien divested. The 13th section of the “act concerning boats and vessels” (Dig. Laws of Mo., 1845, page 183) declares that—“when any boat or vessel shall be sold under the 11th section of this act, the officer making the sale shall execute to the purchaser a bill of sale therefor, and such boat or vessel shall, in the hands of the purchaser and his assigns, be free and discharged from all previous liens and claims under this act.”

What the law gave, the law hath taken away. The libellant cannot complain, his lien is divested by the same law and the same authority which gave it.

District Court for the City and County of Philadelphia, Oct., 1856.

FAIRGRIEVES vs. THE LEHIGH NAVIGATION COMPANY.

1. A partial assignment of a debt, not assented to by the debtor, will not bind the latter at law or in equity, nor deprive him of the right to pay the whole to the assignor, even after notice.
2. The salary of a clerk is not assignable before it is earned, in whole or in part.

This was a motion for judgment on a point reserved at the trial of the case. The facts are fully stated in the opinion of the court, which was delivered by

HARE, J.—This was an action of assumpsit, brought by James Fairgrievs to the use of Susan Erwin, against the Lehigh Navigation Company. The defendants proved a payment in full to Fairgrievs, which was necessarily a bar to the action, unless the company had been deprived of the right to make it by the following agreement between Fairgrievs and Mrs. Erwin, which was produced and proved at the trial:

“I, the undersigned, agree that Mrs. Erwin shall draw from the Lehigh Company fifteen dollars of my pay or salary, (or I to draw it and pay it to her,) on the tenth day of each month, until her debt against me for rent for the house, N. E. corner of Union and Third streets, is satisfied or paid—the first payment to be made 10th of August, 1854.

Signed,

J. FAIRGRIEVES.”

The question is, whether this instrument operated as an equitable assignment, and precluded the defendants from paying Fairgrievs, after receiving a notice to the contrary from Mrs. Erwin. We are clearly of opinion that it did not, first, because of the partial nature of the assignment, and next on account of the nature of the interest assigned.

Although the authorities are not quite consistent, with regard to the effect of a partial assignment of a chose in action, there are some points which admit of but little difference of opinion. It is plain, both on authority and principle, that an entire cause of action

cannot be split or severed by the act of one party without the consent of the other, and that the powers of an assignee rise no higher in this, or any other particular, than those of the assignor from whom they flow. Hence however varied or numerous the interests which may grow out of transactions between the creditor and third persons, but one action can be brought against the debtor, and he will retain the right to discharge the whole debt by a single payment, without regard to the new and perhaps complicated relations, which have been engrafted upon the simplicity of the original obligation. It is true that both law and equity permit and aid the transfer of a cause of action from one hand to another, when assigned as a whole, and not in parcels or fragments, because this merely shifts the right of the creditor, without varying or impairing the position of the debtor, and simply compels him to make payment to the assignee instead of the assignor. But the case is widely different, when a partial assignment seeks to charge the debtor with the burden of ascertaining the respective shares or equities of the assignor and assignee, and paying each the proportion due to him, at the risk of being made answerable for any mistake by the other. If this were permitted in cases like the present, which are comparatively free from difficulty, it could not be refused in others of a different nature, where the obstacles might be great and perhaps insuperable. If a debt can be divided and thus converted into two distinct obligations, it may equally well be cut up into twenty, each possessed of distinct and separate vitality, and each conferring a right on the holder which would enable him to demand an account and payment.

It was accordingly held by the Supreme Court of the United States in *Mandeville vs. Welch*, 5 Wheaton, 279, and by that of Massachusetts in *Gibson vs. Clark*, 20 Pick. 15, that a partial assignment of a debt will not bind the debtor either in equity or law, nor deprive him of the right to pay the whole to the assignor, after notice that part has been transferred to the assignee.

A note to the case of *Morton vs. Naylor*, 1 Hill, 518, assumes that a different rule prevails in New York, but the cases cited by the annotator are limited to these two points: first, that the assign-

ment of a larger demand as security for the payment of a smaller transfers the whole debt, making the assignee a trustee for the surplus; and next, that the assignment of part of a debt may be rendered valid by the concurrence or assent of the debtor. Both these propositions are unquestionable; and it may be doubted whether there is any case in English or American law which goes beyond them. In *Lett vs. Morris*, 4 Simons, 607, an assignment by a contractor, of part of each of the instalments which were to fall due during the erection of a house which he had agreed to build, was indeed held binding on the owner, notwithstanding its partial nature and operation, but then he had assented to it by silence, if not by action, on the one hand, and the assignee had supplied materials to the contractor on the faith of it, on the other. The partial nature of the transfer passed without comment either from the court or counsel, and there are no means of determining whether the failure to notice it arose from oversight, or from an opinion that it formed no obstacle to the recovery of the complainant, and was not worthy of being made the subject of attention. Were this decision more nearly in point than it would seem to be, it could not weigh in this country against that of *Mandeville vs. Welch*, which claims our respect from the force of its reasoning, as well as from the high position of the court which pronounced it. In all doubtful questions of general and commercial jurisprudence the State courts should incline to the opinion of the Supreme Court of the United States, from motives of comity and a desire to secure uniformity of decision, as well as from a due regard to the unity and harmony of our existence as a people. The *American Ins. Co. vs. Insley*, 7 Barr, 223. We have consequently no hesitation in deciding that an assignment like the present, which attempts to divide an entire cause of action, and thus create a multiplicity of demands out of a single obligation, is not binding on the debtor, and will not deprive him of the right to pay the debt into the hands of the person with whom it was originally contracted. But it may be proper to say, that our decision is strictly limited to the effect of such transactions on the rights of the debtor, and that we do not mean to deny that the assignment of part of a debt may be binding, as between those

who are parties to it, and may entitle the assignee to bring suit in the name of the assignor against a defaulting debtor, because such a course merely calls upon the latter to pay the debt, without making him responsible for the appropriation of the money after it is paid. But this is obviously a very different thing from compelling a debtor who is ready and willing to meet his obligations, to undergo the risk and trouble of investigating transactions to which he is a stranger, and incurring new responsibilities in the performance of an act which ought to free him from all charge or liability. The burden of the introduction of a stranger into the relation between debtor and creditor, is sufficiently onerous, when the whole debt is assigned, and would be intolerable if partial assignments were permitted.

Were this, however, less clear than it would seem to be, there would still remain a formidable objection to the title of the assignee, growing out of the nature of the right assigned. This consisted in the salary of the assignor, as clerk of the defendants, before it was earned, and while it was yet a mere contingency depending on his willingness to serve them, and theirs to employ and pay him. The interest assigned was, therefore purely contingent, and depended for its existence not only upon the will of the assignor, but on that of the company, who might have discharged him from their employment, and thus rendered the claim of the assignee wholly nugatory. The case of *Lunn vs. Thornton*, 1 C. B. 379; *Gale vs. Burnell*, 7 Q. B. 850; and *Winslow vs. The Merchants' Ins. Co.*, 4 Metcalf, 306, establish that no grant or transfer can be good at law, unless the right or title granted have some actual existence; it need not be vested in possession, or even in interest, but it must have a real foundation in the past or present, and not depend wholly upon purpose or intention. On the other hand, *Mitchell vs. Winslow* 2 Story 680; *Field vs. The Mayor of New York*, 2 Selden, 179; *Langdon vs. Horton*, 1 Hare, 549, and *Calkins vs. Lockwood*, 16 Con. 276, seem to show what indeed can hardly be doubted, that a transfer which fails as a gift or grant, for want of a present interest, may, notwithstanding, be specifically enforced as an executory contract. But however this may be, it is certain that the assistance of equity in this, as in all other cases of specific performance, is discretionary,

and will not be afforded unless the circumstances of the case are such as to justify and demand it. This distinction pervades the whole field of equitable jurisprudence, and separates it from that of law where jurisdiction is imperative, and the ill use which may be of a remedy, no excuse for withholding it.

The discretion of a chancellor is indeed controlled by precedent, and guided by maxims and principles; but it is not the less a discretion. This is emphatically true when, as in the present instance, the aid of equity is invoked to overrule legal rights, in order to give effect to interests which the law does not recognize. The legal operation of the paper signed by the defendant, is at most that of a draft or order; we are asked to convert it into an irrevocable transfer of the proceeds of his future labor. If the wages of toil can be pledged before they are earned, for the payment of debts, or for the purpose of obtaining credit; if the creditor can step in and intercept them in their passage from the hand of the employer to that of the workman, in what will the condition of the debtor differ from that of a slave? His life and limbs may still be his own, but the right to use them for his own benefit will be at an end, or subject to the control of another. It is true that the transfer now in question, is limited to what might be earned in the service of a particular master. But if equity will sustain and enforce such transactions in any case, it must be prepared to do so in all. The assignment of wages earned in a specific service or employment, may injure one party without benefiting the other, by inducing the assignor to abandon a good situation and seek another less advantageous, but where what he makes will at least be his own. But an assignment of all that the assignor may subsequently earn anywhere, would, at the worst, have the merit of giving the assignee a security on which he might rely with some confidence, unless its effect in depriving effort of its reward, and holding out a motive for idleness, should induce the conclusion, that what destroys hope and fetters exertion, must cause too much ill to be easily productive of good.

No case has been cited which in any way sanctions the idea, that equity will lend its assistance for such a purpose; while there are many which tend to show that no man can be deprived of the right

to devote the proceeds of his labor to his own support and that of those dependent on him, either by his own act or by that of the law. Thus it is well known that the assignment of a bankrupt, goes farther under the English statutes than any transfer which derives its force wholly from his own act or agreement, and yet it is thoroughly well settled, that although the assignees are entitled to every right which accrues to the bankrupt subsequently, however remote or contingent, they cannot claim the fruits of his personal services, and thus deprive him of the means of gaining a livelihood by the efforts of industry or the exercise of skill. The point has been so held in a series of cases, beginning with *Chippendall vs. Tomlinson*, 4 Douglass 318, and coming down to *Williams vs. Chambers*, 10 Q. B. 337. "It is," said Lord Mansfield, in *Chippendall vs. Tomlinson*, "a question of terrible importance, for what is to become of the bankrupt if he cannot earn a maintenance by his daily labor?" The question put by his lordship on that occasion may well be repeated here, where we are asked to establish a precedent which would certainly end in creating the evil which he deprecated. Want, which is ever the parent of that indifference to the future, of which it is generally the offspring, is always ready to sacrifice every thing to the present, which can mitigate its demands and secure a temporary exemption from suffering. What the plaintiff did in this case, under its influence, others would do again in favor of creditors less deserving than Mrs. Erwin, and labor would be subjected to incumbrances equally prejudicial to itself and to the community.

The remarks which have been made, may suffice to show the consequences of sustaining such assignments to the parties, but it may be well to add a few words on the effect which it would have on third persons, and the course of proceeding in which it would involve the courts. Nothing could be more useless than to hold an assignment of future wages valid, and yet leave it to the choice of the assignor whether the work shall be done, for this would be to decide in favor of a right, and then make it dependent on the caprice or will of the person who created it. If such transfers are to be upheld and enforced, they must be treated as contracts between the assignor and assignee, and compelled the assignor to do all that is necessary to render them effectual. The spirit, if not the letter of

an assignment of the salary of a clerk, or the wages of a laborer, is that the person who executes it will go on and do the work, or render the services, which are necessary to call the interest assigned into being. Hence the intervention of equity to be really effectual must go to the length of enforcing the performance of the task which the assignor has impliedly promised to accomplish, and prohibiting its interruption, until the assignee has obtained full satisfaction. And even if such a decree were made and enforced, it might still be frustrated by the refusal of the employer to permit the work to be done or the services rendered. The difficulty, or rather the impossibility of doing this, and the mischief which it would produce if done, are too plain for comment, and render further argument superfluous. We do not think it necessary to pursue the subject further, and enter judgment for the defendants on the point reserved. Judgment for defendants.

*In the Court of Quarter Sessions of Philadelphia County—
November, 1856.*

COMMONWEALTH vs. ANDREW B. FRAZEE.

1. A State may waive its right to exercise judicial authority over portions of its territory.
2. By the agreement between the States of Pennsylvania and New Jersey made in 1783, the juridical investigation and determination of criminal offences committed on the river Delaware are specially provided for, and is exclusive, no other court having cognizance of such offences except as provided by this agreement and subsequent Acts of Assembly.
3. A defendant cannot be called upon to answer two distinct tribunals for the same offence.

THOMPSON, P. J.—The defendant, by his pleas, denies the right of the Court of Oyer and Terminer of the county of Philadelphia, to entertain jurisdiction of the offence charged in the indictment, for the reason that prior to the commencement of the prosecution in this county, he had been been arrested and prosecuted for the same offence in the State of New Jersey, which said State had then the exclusive jurisdiction over the offence alleged to have been committed by him.

The indictment contains three counts, to each of which the defendant has put in a plea, differing from those pleaded to the other counts, only in the manner of stating his arrest and prosecution in New Jersey.

The Commonwealth, by the District Attorney, demurred to the several pleas, and, as by demurring, the truth of the facts stated in the pleas is allowed, the only question presented for decision is—whether the defendant, having been arrested and prosecuted in New Jersey, for the same offence charged in this indictment, and before the arrest or prosecution of the defendant within this Commonwealth, can be again indicted in this court for the same offence?

The facts relied on by the defendant in his pleas, and admitted by the demurrer, are—

That the alleged offence was committed on the river Delaware.

That by the agreement between the States of Pennsylvania and New Jersey, ratified by the State of Pennsylvania on the 20th of September, 1783, and by the State of New Jersey on the 27th March, 1783, it was agreed and established that all capital and other offences committed on the river Delaware, the juridical investigation and determination thereof should be exclusively vested in the State wherein the offender or person charged with such offence shall be first apprehended, arrested or prosecuted.

That by an act of her legislature, passed on the 14th day of March, 1856, the State of New Jersey had committed the investigation and determination of any capital, or other offence thereafter committed upon the river Delaware, under the agreement with the State of Pennsylvania, to the courts and officers of the county of said State of New Jersey, living and being nearest to the place where such offence was committed.

That the county of Camden lies and is the county of the State of New Jersey, nearest to the place upon the river Delaware, where the alleged offence in the indictment, charged against the defendant (if any such offence there was), was committed :

And that the said defendant was arrested and prosecuted in the said county of Camden, in the State of New Jersey, at a Court of Oyer and Terminer held therein for the said county at the May term

thereof, 1856, for the offence alleged in this indictment, and before any arrest or prosecution took place within this State.

Upon this state of the facts, all of which are admitted by the demurrer to be true, the defendant denies the present jurisdiction of this court over the alleged offence.

This objection to the exercise of jurisdiction by this court is properly taken by the pleas filed. Wherever an indictment is found in a court having no cognizance of the offence, or where exclusive jurisdiction is vested in another tribunal, by statute or otherwise, the defendant may plead to the jurisdiction, without answering to the alleged offence; 2 Hale, P. C. 286; 4 Bl. Com. 383. He has the right to have the power of the court to try the offence first determined.

That a State being sovereign, may waive or transfer its right to exercise judicial authority over portions of its territory, cannot be doubted. A State may sell or cede its own territory, with all its powers over it, to another power, as in the case of the cession of the District of Columbia to the United States, or in the sale to Congress of places to be used as forts, dock yards, hospitals, &c. So, by the grants of municipal charters and of franchises, the legislature transfers power often of a judicial nature to corporate bodies.

The act of 1783, upon which the defendant relies, does not assign or transfer to the State of New Jersey any power which the State of Pennsylvania possessed over offences committed on the river Delaware. It waives the exercise of such authority in certain cases, and permits the adjoining State to try an offender arrested within its limits for an offence committed upon the river, in order to avoid a clash of jurisdiction which would necessarily arise from the uncertainty of fixing the locality of the offence. The same act takes care to provide for cases where this uncertainty cannot exist, as where vessels are anchored before any city or town, or are aground upon the shore of either State, that State retains the exclusive jurisdiction over them. The binding effect of the agreement of 1783 has never been questioned, and the advantages arising from it to each of the parties to it have often been recognized by our courts. It has been often appealed to for the adjustment of

differences between the two States. As between Pennsylvania and New Jersey, (says Mr. Sergeant, in his celebrated decision in the *Pea Patch Island case*, p. 122) "this compact was formed upon great deliberation and with the full knowledge of the subject, and is in conformity with the principles afterwards laid down by the Supreme Court of the United States in the case of *Handley's Lessee vs. Anthony*," 5 Wheat. 375. Soon after the passage of the act of September 20, 1783, this State, by the act of September 25, 1786, the exercise of the jurisdiction allowed by the terms of provided for the agreement, by extending the limits of the counties bordering on the river Delaware to the shore of New Jersey.

The State of New Jersey, however, took no measures to vest the jurisdiction over offences committed on the Delaware, in any of her courts, until it was discovered by the decision of the Supreme Court of that State, in the case of *The State vs. Rebecca Davis*, reported in 1 Dutcher, 483, which case occurred in 1855, that no court of that State had jurisdiction over such offences. In consequence of that decision, an act of the legislature of New Jersey was passed, by which jurisdiction over offences committed on the river Delaware was vested in the court of the county nearest to the place where such offence should be committed; and it happened, rather remarkably, that the act thus vesting jurisdiction in the county courts of the State of New Jersey, was approved and became a law on the 14th March, 1856, the very day previous to the time on which the offence alleged in this indictment was committed.

It thus appears that at the time of the commission of the alleged offence, a court of competent jurisdiction existed in the State of New Jersey, to take cognizance of the offence; and the facts admitted by the demurrer show that the arrest and prosecution of the defendant for the same offence took place in the county of Camden, before any proceedings were had in this State. By the arrest and apprehension of the defendant first in the State of New Jersey, the court of that State, which by the laws of that State had jurisdiction of the offence, became entitled under the agreement of 1783, to the exclusive "juridical investigation and determination" of the same. No other court in this State could take cognizance of

the offence. The defendant cannot be called upon to answer in two distinct tribunals for the same offence. And where the jurisdiction of a competent court has attached, no second prosecution can be sustained. No man can be twice legally tried for the same offence.

On the part of the Commonwealth, no reason has been suggested in opposition to what appears to be the necessary construction of the several laws referred to, or to the effect of the facts as set out in the defendant's pleas. It is difficult to understand what tenable argument could be advanced.

For the reasons given, the demurrer must be overruled, and the pleas to the jurisdiction of the court sustained.

Judgment was accordingly entered for the defendants in all the cases similarly situated.

St. G. T. Campbell and J. M. Read, for defendant.

District Attorney Wm. B. Reed, for demurrer.

In the Supreme Court of Alabama—January Term, 1856.

BARLOW vs. LAMBERT.¹

1. *Common law, how far in force in this State.*—The common law of England, as changed and modified by our statutes, is part and parcel of the law of this State, so far as applicable to our institutions and government.
2. *Evidence of custom, admissibility of.*—Evidence of a local custom is admissible, to supply details in a contract, either oral or written, as to which the contract itself is silent; or to show that provincialisms, and technicalities of science and commerce, have acquired a known, fixed, and definite meaning, different from their ordinary import; or where such technicalities, unexplained, are susceptible of two or more reasonable constructions: but it cannot be received to contravene any positive requirement of the law, any principle of public policy, or an express contract whether oral or written, nor to give to plain and unambiguous words or phrases a meaning different from their natural import; and it is, therefore, inadmissible to show that a stipulation in a contract of hiring, that the hirer was to

¹ 28 Ala. Rep., N. S. 704. We are indebted to the learned reporter for this case.—*Eds. A. L. R.*

"lose the negro's lost time," "related to time lost by sickness or running away, and not to time lost in consequence of the negro's death."

8. *General objection to evidence.*—If evidence is offered as a whole, when a portion of it is illegal, the court may, on objection, exclude the whole of it.

Appeal from the Circuit Court of Mobile.

Tried before the Hon. C. W. Rapier.

This action was brought by Andrew Lambert against Robert Barlow and Uriah Barlow, and was founded on the defendants' promissory note for \$175, dated January 1, 1853, and payable twelve months after date. The pleas were, a tender before suit brought, and the general issue, with leave to give any special matter in evidence as a bar to the suit. It was proved on the trial, that the note was given for the hire of a slave; and the witness who testified to the contract of hiring, one J. F. Boyles, stated, that at the time the contract was made, and before the note was executed, "plaintiff told defendant that he (defendant) would have to lose the negro's lost time, without specifying how that lost time might occur,—whether by death or otherwise; and that the defendant agreed to it,—saying that he would lose that time of course." The defendants offered two witnesses, "to prove that the words, 'lose the negro's lost time,' as used in the contract of hiring to which Boyles testified, had a general and well understood meaning in Baldwin county, where said contract was entered into; and they related to time lost by sickness or running away, and not time lost in consequence of the negro's death. They also offered evidence to prove a general and well known custom in said county, where a hired negro died during the year for which he was hired, for the owner to deduct all time from the period of the negro's death; which testimony the court ruled inadmissible, and the defendants excepted. The defendants also proved, that said negro died, during the year, without their fault. The court charged the jury, that the plaintiff was entitled to recover the full amount of the note, with interest, unless they believed from the evidence that plaintiff, when he hired said negro, agreed to make an abatement for the time lost by the negro in case he should die before the expiration of the year."

Wm. G. Jones and Robt. B. Armistead, for the appellant.

Wm. Boyles, contra :

The opinion of the court was delivered by

STONE, J.—The constitution of the State of Alabama (Art. II, § 1) declares, that “the powers of the government of the State of Alabama shall be divided into three distinct departments, and each of them confided to a separate body of magistracy—to wit : those which are legislative to one ; those which are executive to another ; and those which are judicial to another.” The first section of the third article contains this language : “The legislative power in this State shall be vested in * * * the general assembly of the State of Alabama.” By the “schedule” attached to the constitution of the State, (§ 5,) the “territorial laws, not repugnant to the constitution,” were continued of force.

The acts of 1828 and 1832, (Clay’s Digest, §§ 11, 17,) adopted the rules of the law merchant, as to days of grace, demand, protest, and notice, so far as the same affect bills of exchange, and bonds and other instruments payable in bank. The Code (1525, 1526 adopts the “commercial law,” as governing the same classes of instruments, with provisions somewhat variant.

The Code superseded all the “acts of a public nature, theretofore passed,” and which were “designed to operate on all the people of the State, not embraced in said Code ;” except that the acts of the legislature passed at the session of 1851–2, whether approved before or after the adoption of the Code, “but such laws supersede any provision of the Code with which they conflict.”—Code §§ 11, 12.

In *Cawood’s case*, 2 Stew. 360, this court held, that under the 2d article of the ordinance of 1787, “which was afterwards made the fundamental law of” this territory, “the common law of England, so far as applicable,” was made a rule of action for our government, “both in civil and criminal cases.” By a series of decisions, running through our entire judicial history, the above doctrine has been firmly established ; and it must now be admitted, that the common law, qualified as above, is part and parcel of the law of this State.

We believe we have thus exhibited the sources, organic and written, from which our rules of action are mainly derived. The constitution, in the distribution of the "powers of the government," having conferred the "legislative power" on the "general assembly," the question may arise, under what authority, by what warrant, are we brought under the dominion of other *rules of action*? Is it sound, is it consistent with the genius of our government, that any portion of the community less than the whole—any city, town, village, or neighborhood—shall exercise powers which the constitution has conferred alone on the general assembly? Shall such "portion of the community" make unto themselves a law which shall overrule the general law? It becomes us to feel our way cautiously, lest there grow up in our midst some *third estate*, which shall, in time, usurp the government.

While we are not prepared to say that "customs," or "usages," for certain purposes, and under certain restrictions, may not, and do not, rightfully exist, we own ourselves "no friends to the almost indiscriminate habit, of late years, of setting up usages, or customs, in almost all kinds of business or trade, to control, vary, or annul the general liabilities of parties under the common law, as well as under the commercial law." *The Schooner Reeside*, 2 Sumner, 567.

Like most other subjects, on which the minds of men differ, the decisions of the courts, defining what usage or custom may or may not do, have been far from uniform. Much confusion and inaccuracy have crept into the adjudged cases, so that any attempt to reconcile them would necessarily prove abortive. Custom, long acquiesced in, and sanctioned by judicial decision, has given us the systems of laws known as the common law and the law merchant. These systems are judicially taken notice of, and are not subject of proof. *Hogan vs. Reynolds*, 8 Ala. 50. These systems, then, may be declared to have obtained the dignity of law. Local customs, or particular usages, can claim no such eminence. They are not, and cannot become, a rule of action "prescribed." They never assume a character so binding, as that parties cannot, by agreement, place their contracts without their influence. So, when

custom and contract come in conflict, the latter prevails over the former. They are, at most, but a part and parcel of the contract,—the subject of proof like other facts,—and are only binding, because they are part of the contract. Not that the proof in each case shows that the parties, *in fact*, incorporated the custom into their contract; but that by the testimony, it is shown that the particular custom is so general and so known, as to raise the inference that the parties knew of its existence, and contracted with reference to it. It is, in effect, nothing more than one means of establishing a material fact; a case of presumptive evidence. The fact to be established is, that a certain element or stipulation entered into the contract or agreement of the parties. That element or stipulation was either not expressed in the contract, or, if expressed, the parties either cannot, or do not, offer proof of the direct fact. In such case, the rule declares that proof may be made of the local custom or usage, in order that from its existence the supposed element or stipulation may be safely and satisfactorily deemed to be incorporated into the contract. If the proof fail to raise this inference, it should be regarded as insufficient. When custom has been sufficiently proved, it becomes a part of the contract, not *the law* of the case. *Jones vs. Fales*, 4 Mass. 252; *Halsey vs. Brown*, 3 Day, 346.

It follows from what is said above, that custom cannot overturn the positive requirements of the law, or the express contracts of the parties, whether the contracts be evidenced by writings or not. *Renner vs. Bank of Columbia*, 9 Wheat. 587. Neither can custom contravene any principle of public policy. *Snowden vs. Warder*, 3 Rawle, 107; *Dunham vs. Day*, 13 Johns. 44; *Gallatin vs. Bradford*, 1 Bibb, 209; *Williams vs. Gillman*, 3 Greenl. 281; *Waters vs. Lilly*, 4 Pick. 145.

Evidence of custom cannot be received, to give to plain and unambiguous words or phrases a meaning different from their natural import. *Schooner Reeside*, 2 Sum. 567; *Turney vs. Wilson*, 7 Yerg. 340; *Ivsey vs. Phifer*, 13 Ala. 824. This principle rests on a sound public policy. Oral evidence cannot be given to vary or contradict, enlarge or qualify a written contract, or to prove that

the parties intended differently from the legal import of their language, although witnesses may testify, directly and positively, to such different intention. Neither can such result be attained indirectly, by proof that a local custom exists, and has become so known and general, that parties are presumed to have contracted with reference to it, and thus made the custom a part of their agreement. The former is an offer to make direct proof of an inadmissible fact; the latter, an effort to prove circumstances, or facts, from which to infer *the fact*, which, when offered directly, is inadmissible. The statement of such a proposition is its refutation.

We hold, then, that proof of custom may be received, to supply the details of a contract, either written or oral, where the contract is silent in its details, unless such custom contravene the positive requirements of the law, or some principle of public policy. The *Schooner vs. Reeside*, 2 Sumner, *supra*; *Jones vs. Fales*, 4 Mass. 245; *Rankin vs. Amer. Ins. Co.*, 1 Hall, 619; *Gibson vs. Cuyler*, 17 Wend. 305; *Ala. & Tenn. Rivers Railroad Company vs. Kidd*, and *Partridge vs. Forsythe*, at the present term.

It may also safely be laid down, that where by local custom, or usage, provincialisms, and technicalities of science and commerce, and perhaps some others, have acquired a known, fixed, and definite meaning, different from their ordinary import; or, where such technicalities, unexplained, are susceptible of two or more plain and reasonable constructions, it is certainly competent to prove the existence of such custom, as a means of showing the sense in which the contracting parties intended to be understood. *Murray vs. Hatch*, 6 Mass. 465; *Winthrop vs. Union Ins. Co.*, 2 Wash. Cir. Ct. 10; *Sleght vs. Rhinelander*, 1 Johns. 192; *Boorman vs. Johnson*, 12 Wend. 572; Cowen & Hill's Notes to Phil. Ev. 3 vol. p. 1409; *Barger vs. Caldwell*, 2 Dana, 130.

We are aware that, in some adjudged cases, principles are asserted in conflict with some of the rules expressed above. The same remark may be predicated of some loose *dicta* found in other cases, and some of the elementary writers. Of this class are the following: *Middleton vs. Heyward*, 2 Nott & Mc. 9; *Bank vs. Paige*, 9 Mass. 155; *Homer vs. Dorr*, 10 Mass. 26; Bouv. L. D., "Cus-

tom," and cases cited; *United States vs. McDaniel*, 7 Peters, 15; *Coit vs. Com. Ins. Co.*, 7 Johns. 385; *Boorman vs. Johnson*, 12 Wend. 572; *Smith vs. Wilson*, 3 Barn. & Adol. 728; *Cutler vs. Powell*, 6 T. R. 320. A *dictum* in *Price vs. White*, 9 Ala. 563, is perhaps obnoxious to this criticism.

The words testified to by the witness Boyles, as a part of the contract of hiring, that the hirer was to "lose the negro's lost time," are plain and unambiguous. They have but one legitimate meaning, and it was not permissible to give to them a different meaning, either by direct or indirect proof, as was proposed in this case. If the contract had been silent on the matter of the negro's lost time, we do not say that the alleged local custom of Baldwin county, was not a legitimate subject of proof, if offered alone. It was not so offered, and we need not now decide that question.

There is no error in the record, and the judgment of the Circuit Court is affirmed.

In Chancery, New Jersey, May Term, 1856.

JOHNSON vs. HUBBELL ET AL.

1. A person may make an agreement, which will bind him legally, to make a particular disposition of his property by last will.
2. A court of equity will decree the specific performance of such an agreement upon the principles which govern the court, in the exercise of this branch of its jurisdiction.
3. Although the agreement is by parol, if there is a part performance of such a character as, upon the principles recognized by the court, will take a parol agreement out of the statute of frauds, then there is nothing peculiar about an agreement of this kind to exclude it from the operation of those principles.
4. If one party to a parol agreement has wholly or partially performed it on his part, so that its non-fulfilment by the other party is a fraud, the court will compel a performance.
5. Although a party has a right to the protection of the court, if that protection cannot be given him without invading the rights of innocent parties, its aid will be refused.

John T. Nixon and William L. Dayton, for complainant.

A. Sinneckson, J. T. Randolph and A. Browning, for defendants.

WILLIAMSON, Chancellor.—Hannah Johnson, the mother of the complainant, died in the year 1811. At the time of her marriage with the complainant's father, Robert Johnson, she was seised, and possessed, of a very large and valuable estate in the County of Salem. During the coverture, she joined with her husband in the sale and conveyance of a part of this estate for the consideration of twenty thousand dollars, which consideration was received by her husband, and by him expended in the improvement of real estate which he held in his own right. At her death, the value of the real estate which Hannah Johnson left was about eighty thousand dollars. She left two children who inherited this estate—the complainant—and his sister, Anna G. Hubbell, one of the defendants to this suit. By the then existing laws of this State regulating descents, the complainant was entitled to two-thirds, and his sister to one third of the estate, which they inherited from their mother. Robert Johnson, the father, being tenant *by the curtesy*, was in the possession of the real estate of his wife, and received the rents and profits up to the time of his death in 1850. Before the complainant came of age, his father complained to him of the inequality of the disposition made by the law, of his mother's estate, and expressed to him his wishes, that when his son should arrive at age, he would divide his mother's property equally with his sister; and his father said to his son, if he would make such equal division, he would leave his estate equally between his two children, and that if his son did not so divide it, then he would feel constrained to make by will, an unequal division of his own estate, between his son and daughter, and leave the larger portion to his daughter. The daughter was present at this time, and expressed her concurrence in the views of her father.

Shortly after the complainant came of age, the father took his two children into his private office, and there produced and laid before them, the title papers and maps of their mother's estate, and also of his own real estate, and explained to them the location and

value of the respective portions, and urged the complainant to divide equally with his sister their mother's estate. The father then agreed and promised, in the presence of his daughter, that if his son would execute the necessary deeds, for an equal partition of the mother's estate, that he would leave all his own property equally to his two children, share and share alike. He at the same time declared, that if his son refused to comply with his wishes, that he would leave his estate to his daughter, and that would make her share in both estates more than equal to his son's. In consideration of the promise and agreement, so made by his father, the son agreed that an equal division of his mother's estate should be made between himself and sister, and that the father should make the division so agreed upon.

To carry out the agreement, deeds were drawn and prepared, under the direction of the father. After the papers were prepared, he called his children again into his office, and remarked to the officer, who was then present to take the acknowledgments of the deeds, that it was unnecessary to enter into a minute explanation, of the character of the deeds, as his children knew all about them. Mutual releases, between the son and daughter, were then executed to complete the division. These papers were executed, and bear date the 1st of September 1833.

On the 12th of October, 1836, Anna G. Hubbell, conveyed to her father a part of the land which, in the division, was released to her by the complainant, and known by the name of the "Guinea farm." The consideration expressed in the deed was \$20,000.

On the 20th of April, 1850, Robert Johnson made his last will, by which he entirely cut off, and excluded his son, from all right and participation in his estate therein devised. As to the "Guinea farm," he died intestate. All the rest of his property, which was a very large and valuable real estate, he disposed of by his will. A very large portion of it he devised to his daughter for life, and at her death to her three children in fee simple; or, in case of their death, to other devisees named in the will. The residue of his real estate mentioned in the will, the testator devised to his two nephews, Thomas and Andrew Sinneckson.

Robert G. Johnson died in October, 1850, and the devisees are in possession under the will.

These are the facts stated in the bill. The bill is demurred to, and these facts must be taken as true. The bill prays that the agreement, between the complainant and the said Robert G. Johnson, may be specifically performed and carried into execution by the defendant, and they be decreed to convey to the complainant the equal one-half part of the estate of the said Robert G. Johnson; or, if it should be deemed more equitable and just, that the said Anna G. Hubbell be decreed to re-convey to the complainant the land which she received from the complainant as the consideration for the performance of his part of the said agreement.

There can be no doubt, but that a person may make a valid agreement, binding himself legally to make a particular disposition of his property by last will and testament. The law permits a man to dispose of his own property at his pleasure; and no good reason can be assigned, why he may not make a legal agreement to dispose of his property to a particular individual, or for a particular purpose, as well by *will*, as by a conveyance to be made at some specified future period, or upon the happening of some future event. It may be unwise for a man, in this way to embarrass himself as to the final disposition of his property, but he is the disposer, by law, of his own fortune, and the sole and best judge as to the time and manner of disposing of it. A court of equity will decree the specific performance of such an agreement, upon the recognized principles by which it is governed in the exercise of this branch of its jurisdiction. In the case of *Rivers against the Executors of Rivers*, 3 Dessau. Rep. 195, the court, in sustaining the propriety of a court of equity's recognizing and enforcing such an agreement, very properly remarked *that a man might renounce every power, benefit, or right, which the laws give him, and he will be bound by his agreement to do so, provided the agreement be entered into fairly, without surprise, imposition, or fraud, and that it be reasonable and moral.*

In *Izard vs. Executors of Izard*, 1 Dessau. Rep. 116, there is a note to the case, in which most of the old authorities bearing upon this subject are collected. There are two classes of authorities

there collected ; one of which relates to the subject of agreements, by two parties, to make mutual wills in favor of each other, on certain contingencies ; and the other, in which courts of equity have decreed the specific performance of agreements connected with testamentary, or other settlements. In addition to the cases cited in this note, I would refer to the case of *L. Walpole vs. L. Oxford*, 3 Ves. 402 ; and the same case, in 7 D. & E. 138, and *Lewis vs. Madocks*, 6 Ves. 150 ; *Fortescue vs. Hannah*, 19 Ves. 71, and a note to *Randall vs. Willis*, 5 Ves. 366, in which a report of the case of *Jones and wife vs. Martin*, in 3 Amb. 882, is given at length, *Podmore vs. Gunning*, 9 Sim. 644, *Morehouse vs. Colvin*, 9 C. L. & E. Rep. 136.

The case of *Jones and wife vs. Martin*, was this : By articles executed upon the marriage of Mr. and Mrs. Jones, the father of Mrs. Jones covenanted to leave her upon his death certain tenements ; and that he would at his decease, by his will, give and leave her a full and equal share with her brother and sister of all his personal estate, to be held and enjoyed immediately after the decease of himself and his wife and not before. The father, for the purpose of defeating the articles of settlement, conveyed a large part of his property, consisting of East India stock, to his son. On appeal, it was decreed, that the stock and dividends were subject to the covenants.

In the case of *Fortescue vs. Hannah*, 19 Ves. 66, it was determined, that where a father, by indenture, covenants for an equal division, at his death, of all the property he should die seised or possessed of between his two daughters or their families, though he retains the power of free disposition by act in his life, cannot defeat the covenant by a disposition in effect testamentary, as by reserving to himself an interest for life. Following the principles established by these authorities, it was decided in the case of *Rivers vs. Rivers' Executors*, before referred to, that where a woman about to marry a man, had agreed in writing to renounce all claims on his estate, on his agreeing to make adequate provision for her, and had made provision for her, by will, and died, that the court would see the agreement executed, by enlarging the provision, if, in the opinion

of the court, it was not an adequate provision, in proportion to the estate. The authority of all these cases has recently been very fully recognized in the House of Lords, in the case of *Logan vs. Wienholt*, 7 Blight R. 53, 54, and the substance of which is given as follows, in 2 Story's Eq. § 786.

“ If a person covenants, or agrees, or in any other manner validly binds himself to give to A, by his will, as much property as he gives to any other child, he may put it out of his power to do so, by giving away all his property in his lifetime. Or, if he binds himself to give to A as much as he gives to B, by his will, he may, in his lifetime, give to B, what he pleases, so as, by his will, he shall give to A as much as he gives to B. But then the gifts which he makes in his lifetime to B, must be out and out, for if, to defraud or defeat the obligation which he has thus entered into, he gives to B any property, real or personal, over which he retains a control, or in which he reserves an interest to himself; then, in order to protect the agreement or obligation, and to prevent his escaping, as it were, from his own contract, courts of equity will treat this gift to B in the same manner as if it were purely testamentary, and were included in a will; and the subject matter of the gift will be brought back, and made the fund out of which to perform the obligation. At all events, it will be made the measure for calculating and ordering the performance of, and dealing with the claim arising under the agreement or obligation.”

This agreement then, made between the complainant and his father, was a legal agreement; and this court should decree its execution, if, in the exercise of its legal discretion, it can do it without violating any principle of equity, or doing injustice to any third party who has innocently become involved in the transaction. Generally the agreement may be enforced without any embarrassment. If A, enters into an agreement with B, for which he receives a good consideration, to give him his property by will, and in violation of his agreement, he gives it by his will to C, the court will declare C a trustee for B. In doing this it does C no wrong. A having undertaken to make to C a voluntary gift of that which he had no right in law so to dispose of, the court does C no injustice,

and violates none of his rights, by declaring him a mere trustee. To permit C to hold the property as against B, the court would sanction the fraud which A had committed in disposing of the property in violation of his agreement.

Several objections are made to the court's decreeing a specific performance in this case, in addition to the general one which I have considered.

It is said that this agreement was in parol, and is therefore contrary to the statute of frauds. But although this agreement was a mere parol one, if there was a part performance of it of such a character as, upon the principles recognized and acted upon by this court, will take a parol agreement out of the statute, then there is nothing peculiar about an agreement of this kind to exclude it from the operation of those principles. If one party to a parol agreement has wholly or partially performed it on his part, so that its non-fulfilment by the other party is a fraud, the court will compel a performance. In this case the son performed his part of the agreement. He paid a valuable consideration and parted with his property. In fact everything was done and performed by both parties that the character of the transaction would admit of. The part of the agreement which the son was to perform was to be performed in *praesenti*, and that part to be performed by the father, was to be performed in *futuro*. There is no uncertainty about the agreement in the slightest respect. It is definite and certain in every particular. It is specifically set out by the complainant in his bill, and the agreement as alleged, is admitted by the demurrer. There is no objection to a decree on the ground of the contract not being in writing.

It was again objected, that the peculiar character of the contract is such, as should induce a court of equity to refuse its aid in carrying it into execution—that it was a mere *promise* made by a father to his son, and ought not to be looked upon as a binding agreement; and that it is bad policy for the court to recognize an agreement made between a father and son, that the father will devise to his son the whole, or any considerable part of his property—that such an agreement has a tendency to destroy that

mutual relationship which ought to exist between father and son, and should not therefore be sanctioned by a court of equity. I do not consider the agreement in question objectionable upon any of these considerations. It cannot be regarded as a mere promise, which the son relied upon as such, and trusting alone to the honor and word of his father. Here was the son just of age, the owner of a large and very valuable property, which he inherited from his mother. There were but two children; and the father was himself possessed of a large estate. He was desirous of a *family arrangement* with regard to both estates. He pressed the propriety of it upon his son while he was yet in his minority, and under his parent's control. He solicited and insisted upon the arrangement, after his son arrived of age; and he enforced his wishes and parental authority, by declaring to his son, that if he refused to make the arrangement he should be disinherited, and cut of from all share in his father's estate. He fixed the terms of the agreement himself. He requires of his son, as his part of the agreement to be performed, that in this family arrangement he shall part with one-sixth of his estate. An agreement, or family arrangement like this is favored in a court of equity. Marriage settlements, and agreements for family arrangements with respect to property, are viewed with favor by this court. They ought to be respected, and scrupulously carried out by the parties to them; and if they are not, a court of equity ought to enforce their execution. Does it not present a case for the favorable consideration of a court of equity, where a son arriving of age, entitled in his own right to a large estate, obedient to parental authority, enters into a family arrangement with his father, at the father's request, by which he parts with a valuable portion of his inheritance, and that son afterwards without any reason is disinherited by his father, comes into a court of equity to ask that the family arrangement may be carried into execution? As far as the circumstances of that arrangement are before the court, it appears to have been an equitable one and perfectly proper, and that gross injustice has been done to the complainant, by his father's refusing to comply with his agreement, and to carry out fairly the family arrangement, which was made at his solicita-

tion, accompanied with all the persuasion and influence of parental authority. The complainant is certainly entitled to some relief; and if there is any insurmountable difficulty in decreeing the agreement to be specifically performed, the court will endeavor to give him relief in some other shape.

There are difficulties in the way of enforcing the performance of this agreement specifically, which appear to me to be insurmountable. The complainant has a right to the protection of this court, and to its aid in establishing and enforcing his rights; but if that protection and aid cannot be afforded him without invading and disregarding the rights of others, this court may not, in its anxiety and desire to relieve one party, inflict a wrong and injury upon another, entirely innocent in the transaction.

The agreement on the part of the father was, that he would leave all his property equally between his two children, the complainant and his sister. The father has violated his agreement as to both, and has disappointed the expectations as well of his daughter as of the complainant, his son. But it is manifest that this court cannot decree the daughter entitled to one-half of the property. She was no such party to the agreement as to entitle her to have it specifically performed for her benefit. She agreed to nothing on her part—there was nothing on her part to be performed. She received the consideration which her father exacted for his part of the agreement. She was benefited and not injured by the agreement as far as it was performed.

Suppose the court should declare that the complainant has an attaching equitable trust in the testator's estate, in the hands of the devisees under the will, and is entitled to one-half of that estate? Of such a decree, the grand-children or nephews, who are devisees, would have no right to complain, because what the testator devised to them he had no right so to dispose of. He had agreed to dispose of it otherwise, and the party to that agreement claims the benefit of it. But not so with Mrs. Hubbell. By the agreement she was to have one equal part of the estate with her brother. She has been disappointed as well as he in her expectations, and she has only a life estate in part, instead of a fee simple in one-half the

property. How can I carve out of this estate, devised as it is, the portion which the complainant claims without doing an injury and injustice to Mrs. Hubbell. Mrs. Hubbell is not in any way responsible for the will of her father. It is not alleged that she controlled him, or endeavored to control him, in making his will. She is an innocent party, and entitled as much to the protection of the court as the complainant. Suppose I was to take out of this estate one-half for the complainant? I could not alter the character of the estate, which the devisees have under the will, to the other half. Mrs. Hubbell then would necessarily have a life estate only in a little more than one-half of what is given her by the will; and yet retaining all the will gives her, it is not equal to the absolute property in one-half of the estate, which, if the agreement had been performed, she would have been entitled to.

Now, although the agreement upon which the bill is filed is a legal one, it does not follow that a Court of Chancery will decree its specific performance. It is not a matter of *right* in either party that the court should make such a decree; but it is a matter of discretion in the court, which withholds or grants relief according to the circumstances of each particular case, when the general rules and principles which govern the court will not furnish any exact measure of justice between the parties. 2 Story's Eq. Jur. 742. Courts of equity will not enforce the specific performance of a contract at the instance of a vendor, where his title is involved in difficulties which cannot be removed, although it may be a case where, at law, any action may be maintained for damages; or in a case where the character and condition of the property, to which the contract is attached, have been so altered, that the terms and restrictions of it are no longer applicable to the existing state of things; or in cases where, from a change of circumstances or otherwise, it would be unconscientious to enforce it. The proposition may be more generally stated: that courts of equity will not interfere to decree a specific performance, except in cases where it would be strictly equitable to make such a decree. 2 Story's Eq. Jur. §749, 750, and notes.

In this case, the situation of the property to which the contract is attached is such, and the rights of third parties are so involved

in the subject matter of the controversy, as to render it extremely embarrassing and difficult to carry into effect a decree for specific performance. I arrive at this conclusion with less reluctance than I otherwise should from the consideration that the complainant is not remediless in the premises.

The consideration of the agreement, on the part of the complainant, was that he should convey to his sister one-sixth part of his inheritance which he had received from his mother. Mrs. Hubbell was present when the arrangement was made. It was a family arrangement, made between the father, son and daughter. The daughter assented to it, and to carry out the family compact, she accepted from her brother a conveyance of the land, which was the performance of his part of the contract. She accepted it upon the terms of the agreement, which terms, if faithfully carried out would have conferred additional benefits upon herself as well as her brother. The family arrangement has not been carried out; and it is against equity and good conscience that the sister should continue in the enjoyment of her brother's land without compensation or satisfaction. This the court can restore to the complainant.

There are several objections interposed to this form of relief. It is said no fraud is imputed to any of the parties at the time of making the agreement, and no fraud is alleged to have been committed by Mrs. Hubbell since; that Mrs. Hubbell made no promise which was to be fulfilled on her part; and that she is not responsible for the non-fulfillment of the agreement by her father.

The fraud of the father was in not making his will and dividing his estate between his children, after having induced his son to part with a portion of his inheritance, relying upon his father's promise that he would make such will; and it does not deprive the breach, or non-fulfillment of the contract, of its fraudulent character, because the fraud was not meditated at the time the agreement was made. The fraud of the daughter is, in retaining her brother's land *without consideration*, which is against good conscience; and it is to protect the complainant against such fraud, that this mode of relief is proper. That Mrs. Hubbell made no agreement or promise with her brother, that she would be responsible that the contract

should be carried out, does not make it the less unconscionable, that she should hold her brother's land, conveyed to her under a family compact, made for their mutual benefit, which has failed of execution through default of neither of them, but of a third party. She accepted the land under the family arrangement; that arrangement has fallen through. The position of the complainant is of some consideration with the court. He was one of the heirs-at-law of Robert G. Johnson. He is not only a sufferer by the father's violation of the agreement, but without cause has been disinherited; and that, which in law and justice belonged to him by his double right as heir and by contract, is all, or nearly all, bestowed upon his sister and her children. Under such circumstances, to permit the sister to enjoy, without any consideration, a part of that inheritance which the complainant derived from his mother is unjust, and a court of equity ought to prevent it.

This relief the complainant is not entitled to under the present bill as it is framed. The demurrer is therefore well taken, and must be sustained with costs. The complainant is at liberty to amend his bill, if he sees proper, upon the usual terms, so as to adapt it to the views I have expressed and relief suggested.

CERTIFIED DECISIONS OF THE SUPREME COURT OF CALIFORNIA, 1856.

HEYDENFELDT, J.—The current of decisions of this court goes to establish that the policy of this State, as derived from her legislation, is to permit settlers, in all capacities, to occupy the public lands, and by such occupation to acquire the right of undisturbed enjoyment against all the world but the true owner.

In evidence of this, acts have been passed to protect the possession of agricultural lands acquired by mere occupancy; to license miners; to provide for the recovery of mining claims; recognizing canals and ditches which were known to divert the water of streams from their natural channels, for mining purposes; and others of like character.

This policy has been extended equally to all pursuits, and no partiality

for one over another has been evinced, except in the single case where the rights of the agriculturist is made to yield to those of the miner, when gold is discovered in his land. This exceptional privilege is, of course, confined to public lands, as we held in *Stokes vs. Barrett et al.*, at the last January term. The policy of the exception is obvious. Without it, the entire gold region might have been enclosed in large tracts, under the pretence of agriculture and grazing, and eventually what would have sufficed as a rich bounty to many thousands would be reduced to the proprietorship of a few.

Aside from this, the legislation and decisions have been uniform in according the right of peaceable enjoyment to the first occupant either of the land or anything incident to the land. In the case of *Irwin vs. Phillips*, at the January term, the question was as to the use of water, and it was decided upon the principle of prior occupancy.

The appellants insist that as the State has granted the franchise of digging gold, all the incidents necessary to that purpose, wood, water, &c., must follow. This is certainly the doctrine of the common law, and would be held decisive in this case, in the absence of any other right to contradict it. But in previous decisions we have shown that there is nothing sufficiently expressive in the character of our legislation, which warrants an invasion upon the already acquired rights of individuals, except in the single case of agricultural lands. In the case of *Stokes vs. Barrett*, we declared that "to authorize an invasion of private property in order to enjoy a public franchise, would require more specific legislation than any yet resorted to." In *Irwin vs. Phillips*, we say "that however much the policy of the State, as indicated by her legislation, has conferred the privilege to work the mines, it has equally conferred the right to divert the streams from their natural channels." And further, we say, "the miner who selects a piece of ground to work, must take it as he finds it, subject to prior rights, which have an equal equity on account of an equal recognition by the sovereign power."

In the case of *Fitzgerald vs. Unton*, at the July term, it appeared that a party of miners invaded, for mining purposes, a town lot built upon and used as a tavern and stable yard. The defendants there relied upon the statute which gives mining privileges upon public lands in the possession of others for agricultural and grazing purposes. In referring to that statute we say, "in permitting miners, however, to go upon public lands occupied by others, it has legalized what would otherwise have been a

trespass, and the act cannot be extended by implication to a class of cases not specially provided for."

It results, from the consideration we have given the case, that the right to mine for the precious metals can only be exercised upon the public lands; that although it carries with it the right, such as the use of wood and water, those incidents must also be of the public domain in like manner as the lands; that a prior appropriation of either to steady individual purpose, establishes a *quasi* private proprietorship which entitles the holder to be protected in its quiet enjoyment against all the world but the true owner, except in the single case provided to the contrary by the statute which I have already adverted to.

Upon the remaining point argued I have only to add, that the facts do not make out a license from the respondent to the appellants. It would be strange to take away a party's rights upon such slight grounds. *Tur-tar vs. The Spring Creek Water and Mining Company.*

NOTICES OF NEW BOOKS.

COURT OF CLAIMS. REPORTS AND DIGEST OF OPINIONS, DELIVERED SINCE THE ORGANIZATION OF THE COURT. By JOHN C. DEVEREUX, Counsellor at Law. New York: Banks, Gould & Co., 144 Nassau Street, 1856.

The Court of Claims having now been in successful operation for nearly two years, and having in the meantime been obliged to form its practice, and almost the very principles of law under which it is to work, has accumulated a respectable body of decisions, which are collected in the present volume. The materials of which the work is composed, consist of the recent report of the presiding judge of the court, to Congress, upon the character and extent of the business and operations of that court: a Digest of the opinions delivered, with some of the more important opinions given at large, and an Appendix, containing: I. A statement of the origin and history of the Court. II. The Acts of Congress relating thereto. III. The Rules of Court. IV., V. A List of Commissioners to take testimony; and of the Attorneys and Counsellors. VI. Some articles by the Reporter on the character, practices, and judicial powers of the court. The manner in which these materials are put together is, perhaps, somewhat loose, but we can recommend the book to such of our readers as have a share in the large and increasing business of the court, as being carefully prepared and in every respect a useful *vade mecum*.

A GENERAL INDEX TO THE COMMON LAW REPORTS, VOLUMES 1 to 88 inclusive.
 Second Edition. By GEORGE W. BIDDLE and RICHARD C. MCMURTRIE, of the
 Philadelphia Bar, 2 vols. Philadelphia: T. & J. W. Johnson & Co., 1857.

A work involving so much labor and embracing such an immense number of points, cannot be reviewed satisfactorily without study and labor on the part of the reviewer himself. A long use of the first edition of this Index, for which the profession were indebted to Mr. Biddle, enables us to speak with more confidence than we should otherwise be willing to do without a critical examination of this edition. The first and essential element of any index, is *accuracy*; the well known character of the editors with their brethren of the Bar at home, is a sufficient voucher for that. The second indispensable requisite is fulness in the number of titles and the multiplication of sub-heads, and this the table of titles shows, by simple inspection. A ready mode of finding a point decided anywhere in one hundred and sixty-three volumes of law reports, is a signal comfort to a professional man, who frequently is compelled to seek his authorities in the hurry and perplexity of *nisi prius* trials. We do not hesitate to commend the labors of our friends, Messrs. Biddle and McMurtrie, to the earnest consideration of the profession, feeling quite sure that the inquirer into the common law authorities from 1818, will not be disappointed in readily finding the very case or point he here seeks.

REPORTS OF CASES ARGUED AND DETERMINED IN THE SUPREME COURT AND THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY. A. O. Zabriskie, Reporter. Vol. IV. From February term, 1858, to March term, 1855, inclusive. Trenton, 1856. pp. 945.

REPORTS OF CASES ARGUED AND DETERMINED IN THE SUPREME COURT AND THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY. Andrew Dutcher, Reporter. Vol. 1, from June term, 1855, to June term, 1856, inclusive. Trenton, 1856. pp. 717.

The New Jersey reports have always borne a high character with the profession, both from the learning of the men who argued questions in her forum and from the signal ability of the judges who decided them. The matter of reporting has not always been as faithfully, nor as adequately done as the fame of the bar would seem to have merited. For many years the appointment of her reporters was given for political reasons and was frequently a mere *job*. This was found by the bench and the bar, an

intolerable grievance, causing both the one and the other sometimes to appear in the most unsatisfactory shapes, and was of course abandoned.

The present enlightened, and able judges of both the common law courts and the chancery have appointed their own reporters, and a new and better system of reporting has been the satisfactory result. Mr. Zabriskie's Reports, in all the four volumes have been marked by some of the best qualities of reporting—care and accuracy. No one who has not superintended the sheets of a volume though the press can, for a moment, conceive of the vexatious and annoying blunders which will arise in spite of all care: sometimes from imperfect manuscript, sometimes from ignorance of compositors, and sometimes from haste of authors, which, when all combined, disturb not a little a careful reader.

While we take pleasure in commending the learned and faithful labors of Mr. Zabriskie, we cannot but condemn that narrow State policy which intrusts the printing of the law reports, which are to be a record for the guidance of all coming time, to newspaper offices or newspaper printers, sometimes the same volume being printed at two or more different offices, by printers who are not always familiar with law terms and law books. Some of the sheets in 4 Zab. are sorry specimens of paper and printing, particularly the sheets of the Index.

In the first volume of Dutcher, the faults of type and paper are corrected and with some unimportant blemishes which time and experience will not fail to amend, the book is highly creditable, and we read it with pleasure and profit. The cases themselves are pretty much of the same character as those that arise in other States. *Corneilus vs. Giberson*, p. 1, decides some important and interesting matters in the land laws of the State, *Grant vs. McGuire*, p. 356, determines a new phase of an old question, *Moulin vs. Ins. Co.*, p. 57, and *Capen vs. Ins. Co.*, p. 67 are useful decisions; *Remyon vs. Central R. R.* p. 556, adds its weight to a pretty long line of cases which must now be considered as settling the point involved; *Sayre vs. Sayre*, p. 235, has a most learned review of all the English and American cases, on the subject discussed; *State vs. Davis*, p. 386, is an important decision which has led to legislation, and *State vs. Fox*, p. 536, will always claim attention.

THE

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A REVIEW OF THE DECISION AND REMARKS UPON THE DOCTRINE OF KUHN vs. NEWMAN, 2 CASEY, 227.

Some remarks upon the judgment and doctrine promulgated in this case are not improper, for both are of great practical importance in that branch of our law where it may almost be said, that certainty and stability are all that are required.

The decision does, beyond question, overturn three judgments of the same court, and the doctrine, if it is to be a basis for logical consequences, must introduce a new system of conveyancing.

One point decided in the case certainly was, that where lands are devised in trust to maintain and educate grand-children during their minority, and then in trust for them equally, the shares of females to be held to their separate use, neither those of full age nor the minors, neither the sole nor the married, are entitled to a conveyance from the trustees. The reason assigned and elaborately argued, is, not that their estates were legal estates by construction of the will, but that being trusts, the title was as absolutely in the *cestuis que* trust as if the legal title had been conveyed by the trustees; and it was further declared, as respects the separate uses and the provisions for the minor's education, that neither object could retain the estate in the trustees. The doctrine is therefore—First, that an

equitable title in a trust executed, is so perfect that the owner has no right to the useless form of a conveyance of the legal one. Second, that a trust for a minor's education passes out of the trustee, and he cannot execute it. The former was necessary to the decision as respects the adult grand-children, for as to those females born after the testator, the restriction upon alienation consequent upon such a limitation as that proposed by the will, was contrary to the rule against perpetuities, and it certainly was not intended to say that that rule does not extend equally to legal and equitable estates. The latter point was not needed for the decision, and the profession will scarcely credit the doctrine as that of the five judges.

But the whole tenor of the opinion is this, that our law does not recognize the distinction of complete legal and equitable titles, even for the purpose of perfecting the latter by conveyance from the trustee. It is intended to cite some of the cases recognizing and insisting on this distinction, and to point out some of the consequences of this novelty.

But first, as to that singular declaration that a trust for a minor's education is executed in him as the legal estate. It has been twice decided, that where the law authorizes the appointment of a person to take care of the property of one not *sui juris*, this is confined to cases where there is not already a trustee appointed by deed or will, and that the person appointed by the law cannot interfere with property already clothed with a trust for the same object.

1. In the very case of a guardian—*Vanartsdalen vs. Vanartsdalen*, 2 Harris, 387, decided that the guardian could not interfere with property devised in trust for the maintenance of a minor. It was there said that authority is not needed, that a grandfather may entrust his property to a trustee of his own selection, excluding the father, as guardian, from interference.

The circumstances of that case are, as an illustration of the propriety of a rule, worth pages of argument.

And is it not astounding to learn that no one lawyer, conveyancer, scrivener, or citizen, but has been so ignorant as to frame these provisions in innumerable instances, and not one can be found in which a doubt has been expressed of their validity, nor where the excluded

guardian, stimulated by the prospect of a commission, has ever attempted to take possession, except in the one cited, where his pretensions were treated with contempt? What is the result? A minor's property must be entrusted to a guardian, though the donor knows perfectly that he is the most incompetent of men—and the least deserving of the trust—and that litigation must be the only remedy for the object of his bounty.

2. In the matter of *John Wilson's estate*, 2 Barr, 329, a committee of a lunatic was held not to have any right to the lunatic's property if it was clothed with a trust, and he was said to be the very last person in the world to be so entrusted, as it was his business to see that the trustee properly accounted.

It is, therefore, not too much to affirm, that a settled rule of real property is upturned by this case, unless we resort to the explanation that all this was but a wanton scattering of doubt, since it mattered not whether the estate was in the trustee or not, for the decision was that the trustee could not be compelled to convey to the infant.

As to the non-existence of any title in the devisees in trust,—if the decision settles anything, it decides this. For the prayer was by a cestui que trust, having a fee simple for a conveyance from the trustee.

It is not put by the court on the ground that the intention of the will was that the legal estate of the trustees should cease at the majority of the cestuis que trust, nor could it be. For the provisions are such, that a perpetual estate in the trustees, until duly divested by a conveyance, was intended and passed. There was a discretionary power of sale as well in the trustees as their successors, and this, by the statute and the decision of this very court, so absolutely vests a fee simple, that there can be no recovery by the cestuis que trust in their own name, as has been settled in *Cobb vs. Biddle*, followed by *Blight vs. Ewing*, where the authority to sell was a naked power, as the will (not printed in the report) shows.

When was this power to cease? It was annexed to the estate of the trustees, and surely it could be exercised until the owner, by his election to take the estate out of them, determined the

power and the trust. This provision is unnoticed. And is it possible the court is to be understood as deciding that a discretionary power of sale shall pass a legal estate to the executors, whilst a devise to them, with such power of sale, to maintain an infant, and then for him, passes the title directly through them, and vest in the infant? Assuming, then, what is admitted in the judgment, that by the common law system here was a case of a legal estate fit for conveyance to the *cestui que trust*, what is the judgment? That the title passed by operation of law, so that a deed is so unnecessary as to come within the rule *lex neminem cogit ad vana*.

The third case deliberately overruled by the court is *Franciscus vs. Reigart*, 4 Watts, 98; a case remarkable as involving the estates of the same family as *Kuhn vs. Newman*, and yet one which the judge must have overlooked, or his assertion would have been impossible.

There the deed conveyed the rents to Newman (p. 107) and his heirs, for *his and their use*, in trust as to 2-15 for M. H., her heirs and assigns, as to 1-15 for E. L., her heirs and assigns. It was confessedly a naked trust, except so far as there was a power of sale, precisely as in *Kuhn vs. Newman*, and there had been a partition of the equitable estates which had vested in fee simple. The question was, who had the right to distrain for the rent, Newman, the trustee, or the *cestui que trust*, to whom the rents had been allotted in severalty in fee? It was decided that Newman only could distrain. Why? If, says the judge below, (p. 108,) the statute executed the use, no estate remained in the grantee, but as it was limited to the use of the grantee, it was not executed, and Newman was entitled. The language of Kennedy, J., affirming the judgment, ought to be contrasted with that of Mr. Justice Lowrie.

KENNEDY, J.

Although by the terms of the deed, Newman would be considered and treated in equity as a trustee, yet at law he must be considered as the legal owner of the rent, and as having a right to receive

LOWRIE, J.

In relation to titles to land, our law, adopting the forms of both law and equity as legal forms, treats all complete equitable titles as complete legal ones where the persons named as trustees

KENNEDY, J.

LOWRIE, J.

and to enforce the payment thereof to him. The rents being granted to him in fee for *the use* of himself, his heirs and assigns, to receive the same in trust for the benefit of others named in the deed, the statute transferring uses into possession does not operate on the second or ulterior use. At law it is considered repugnant to the first use, which is in favor of Newman and his heirs. and it is in equity only he will be considered as a trustee. *This second use not being executed by the statute*, he had an unquestionable right to distrain for the rent. * * *

The partition was intended to operate upon the equitable interest of the parties concerned, and not upon the legal title and rights in the estate.

have no duty to perform that requires the seisin and possession to be in them, and then our common law enforces the trust as a legal estate. * * We have carried it (the merger by the statute of uses) out generally, for even those uses which were not executed by the statute—for example, those that are limited against the rules of the common law, *a use limited upon a use*, a use of chattels real, and a trust to receive rents and pay them to another, *all these are executed by our principle.*

Considerable labor has been bestowed in searching for a precedent to support these assertions. None have been found, whilst two cases at the least are necessarily based upon the existence of a rule the direct opposite of this: *Slifer vs. Bates*, 9 S. & R., and *Franciscus vs. Reigart*, already noticed. Can it be meant to say that Duncan and Kennedy, JJ., who delivered the judgments in these cases, did not know the simplest rule of conveyancing? It is clear this is so, if the language of Mr. Justice Lowrie is accurate. That there has been fluctuation in the limits of the rule, as to the distinctive nature and qualities of legal and equitable estates, is true, but the extreme length has not, it is believed, gone to this point. Inheriting a system perfected and known, and our Legislature jealously refusing the courts the capacity to work that system by the grant of adequate equity powers, they were compelled either to ignore all trusts, or to do what could be done for them according to common law forms of procedure.

Thence followed the rule of Pennsylvania Jurisprudence. An equitable owner may have the same remedies and defences which he would have if his estate had been turned into a legal one. But this was in aid of the *cestui que trust*, not as a bar to his having the

legal title, if there were means to get it. If a case can be shown to the contrary, let it be produced. What an idle thing was the invention of the action to compel a conveyance by a conditional verdict. This action would never lie but on a perfect equitable title. Yet from our earliest judicial history, in all the cases, and they are pretty numerous, the defence suggested by this cause has never crossed the mind of counsel or court. It would have been thought very much as if a debtor should plead that he had an equitable defence because equity considers that as done which ought to have been done, and he certainly ought to have paid his debt.

What is the proposition of the learned Judge on which his argument is founded. Our law "treats all complete equitable titles as complete legal ones, where the persons named as trustees have no duty to perform, that requires the seisin and possession to be in them, and then our common law enforces the trust as a legal estate;" but the consequence from this, that the unhappy owner of the equity cannot have a legal title, because it is already one by operation of law, is certainly a violent wrenching of a rule adopted by necessity in aid of justice. What is a complete equitable title? It is that which lacks but a conveyance to be a legal one; that conveyance being a duty on the part of the holder. Now the very reason for what we call legal titles, is to have the existence of such a right put into form, not disputable as matter of evidence, nor uncertain as matter of effect. For this deeds were invented, and the statute of frauds passed. But equitable titles shade off in both these things from what is so certain, that a deed is a ceremony only, down to that about which no two men would chance to agree. Yet before the Judge can give the property to one or the other, he must decide that he has a complete equitable title. Surely no one can recover in equity on what is not, as to the other party at least, a complete equitable title. From the estate not vested under the statute of uses, because of the limitation to the feoffee's own use, down to that which arises *ex malificio*, where the scale is turned by the recollection of a single witness, where is the line to be drawn as to what constitutes a perfect equitable title. As soon, however, as protracted litigation has authorized the decree that the complainant has a complete one,

the court must stay its hand, because a legal title had vested by operation of law long before, viz : when the circumstances happened, which conferred an equitable title. Can it be said that this rule is confined to equitable titles complete by being evidenced by a deed or will? But what are the cases in which the rule, relied on as supporting the doctrine, has been laid down and applied. They are equitable titles arising from fraud, from misapplication of money, purchases from such parties with notice, and all the endless variety of cases falling under the head of trusts *ex malificio*, or by parol agreements. On what ground is it that these cases profess to go; simply in the language of *Kuhn vs. Newman*, that our law considers the equitable estate as the legal one (for the purpose of affording relief) not of preventing the perfection of the title. And what more complete equitable title exists, than that of a purchaser under articles who has paid the price, at the time agreed upon. Is he to have no deed? Yet if he has, what is equivalent in every respect, or rather "the result of all this, that devisees under a limitation in trust for them, take a legal estate as soon as they are entitled to have it;" how can he ask to have that bettered which is perfect. Yet no man in his senses would say that such a title is a perfect one, even according to Pennsylvania Law; if it were, what becomes of the rule that a deed in execution of the contract may vary that estate, and all the stipulations are merged in that deed; while if a legal title has passed the subsequent deed cannot vary the former—*Kenrick vs. Smith*, 7 W. & S. 41. And again, words of limitation are not required in a contract of purchase; it imports a fee simple. But a deed to a man and his posterity, so long as the River Delaware shall run, is but a life estate. Are we to introduce into conveyancing the distressing uncertainty which prevailed in the construction of wills, as to the quantity of the estate. What benefit accrues by thus dividing equitable estates into those which may and may not be perfected by conveyance of the legal title. And why deny to the *cestui que trust* the power of having the termination of the trust evidenced by a title deed; and what is of no little consequence, having such a title as will be recognized in the Circuit Court of the United States.

And on the other hand, is it not most inconsistent to see the courts so rigidly adhering to the distinction of legal and equitable titles in everything but land. Is not the assignee of a bond or debt the absolute equitable owner; may he not sue in equity in his own name. Nay, will not courts of law compel the assignor to permit his name to be used, and give the entire control of the action to the cestui que trust. Or is it meant judicially to extinguish this distinction also. What cases are cited for this.—1st. *Hemphill vs. Hurford*, 3 W. & S. 216. That on a bequest of money in trust for a person, sui juris, with a discretionary power of withholding it for three years, the legatee or his assignee may sue for it at the end of that time. The 2d, *Smith vs. Starr*, 3 Wharton, 62. That a trust for a separate use ceases on discovery, and may be conveyed. No question was made as to this distinction of titles, nor could there have been any, because the legal title had actually passed; the point was, whether the cestui que trust could convey. The 3d, *Hammersley vs. Smith*, was the same point, on a bequest of money in trust; the action being an equivalent to a bill to compel payment by a trustee. All very good illustrations of the rule that trusts may be enforced through common law forms. Now let us look at some of the decisions to the contrary. Dicta are so numerous that but a few can be quoted, but their weight as evidence of the understanding of the profession on such a point as this, is enormous.

1. The distinction as to the right to rescind for mistake or misdescription, or to recover back purchase money for defect in title, depends on the fact of transfer of the legal title by conveyance having been made or not. *Lighty vs. Shorb*, 3 Penna, 447.

2. The holder of the mere equitable title, though perfected by payment of price and possession, may pledge that for another debt to the holder of the legal title, and a purchaser of his right is bound to take notice of it. *Keifer vs. Altman*, 3 Penna, 27; *Cahoon vs. Hollenback*.

3. The purchaser of a perfect equitable title is bound by secret trusts, if he chooses to permit the legal title to remain outstanding, and it is got hold of by the owner of the secret trust—*Kramer vs. Arthurs*, 7 Bar. 165; and this case is the more striking, because

the rule as laid down in *Kuhn vs. Newman* was so laid down in the court below by the same judge, and carried the case. For which cause the judgment was *reversed*. In accordance with this will be found *Chew vs. Parker*, 3 Raw. 338; *Beltzhooover vs. Darrah*, 16 S. & R. 238; *Chew vs. Barnett*, 11 S. & R. 389; the limitation probably being that stated in *Bellas vs. McCarty*, 10 W. 13, that the legal title is available only to fix with notice of the rights of the holder of it.

4. Where a conveyance is by bargain and sale, all limitations after that to the bargainee, are but trusts. *Slifer vs. Bates*, 9 S. & R. 166. Nor was this a dictum; it was the ground, and the only one, on which a limitation for life and an ulterior one to the right heirs of the tenant for life, were kept from uniting under the rule in *Shelly's case*. *Franciscus vs. Reigart*, 4 W. 98, reiterates this as settled so entirely that no authority is cited in support of the rule.

5. A trust (apparently naked) passes under general words of devise of the trustee's property. *Hunt vs. Crawford*, 3 Penna. 426.

6. So of a conveyance, it being declared by the court perfectly immaterial whether the trust was a naked or special one. *Huston vs. Wickersham*, 8 Watts, 522; *Heath vs. Knapp*, 4 Bar, 228.

7. The want of tender of a legal title within six years, bars the right of a vendor to sue under the statute of limitations. *Walters vs. Walters*, 1 Whart, 302. The distinctions between the two kinds of title, and the necessity for the legal one being recognized as precisely what it would be in the Queen's Bench in England.

9. To enable a use to be executed under a deed to A, to the use of B, the statute of uses and the recording acts, are deemed essential. *Sprague vs. Woods*, 4 W. & S. 195; without them the deed must operate in another manner to pass the legal title.

9. There being a perfect equitable title by devise, (a remainder in fee) an action for waste against the tenant for life must be brought in the name of the trustee; *Woodman vs. Good*, 6 W. & S. 173. Where the freehold is in trustees, actions against strangers must be brought in the name of the trustee. *Unangst vs. Shorts*, 5 Wht, 523.

10. The limit of the jurisdiction for the appointment of trustees, laid down by Kennedy J. in *Carlisle's* appeal, 9 W. 532, is based on the descent of a naked trust to the heir at law of the trustee.

Such are some of the decisions; the dicta are not the less striking.

It is erroneous, says Gibson C. J., to consider the two estates as the same but in form, *and then only*, for giving a remedy as a substitute for a bill; *Pennock vs. Freeman*, 1 W. 408; and this was the only ground for giving the remedy by partition to cestuis que trust, *Willing vs. Brown*, 7 S. & R. 468; which extends to equities resting on oral testimony. *Stewart vs. Brown*, 2 S. & R. 461.

I need not refer, says Gibson C. J. in *Coze vs. Blanden*, 1 W. 535, to *Lodge vs. Simonton*, 2 Penna. 439, to show that to confound the legal with the equitable title, would confound our most settled distinctions, and throw our jurisprudence into irreparable disorder; and our books are full of instances in which the title depends on the distinction; and it is not too much to say, that an attempt to abolish it would shake our landed property to its foundation.

In *Pullen vs. Reinhard*, 1 Wht. 521, Kennedy J. recognizes the distinction as settled between trusts to permit another to receive, and those to receive and pay which are said (p 231, 2 *Cassey*) to be equally executed.

When, therefore, we look at the nature of the doctrine, a fundamental law of the forms of title; at the numerous decisions based upon it; at the dicta of the learned judges, whose experience extends back nearly to our beginning as a nation; to the practice of our conveyancers, can it be possible that all were mistaken. Where is this to end; whose learning will solve the questions which will arise. It is like taking away a stone from an ancient foundation; how far the superstructure will be affected no sagacity can predict, and time only will develope, at the expense of the unfortunate inmates.

Already have two questions arisen, which startle practitioners. 1. How far can you take a title by contract and leave a right to a formal deed. 2. Who is to release ground rents where the devise

is in trust, simply. Thousands have been extinguished by trustees who, under *Kuhn vs. Newman*, had not a spark of interest; and consequently the money has been (if that truly declares the law,) knowingly paid to the wrong hand. But compared with the fact that, that is gravely announced as the settled law of the country, which convicts every former judge, counsel and conveyancer, of ignorance of the fundamentals of our law of real property, particular evils are insignificant.

RECENT AMERICAN DECISIONS.

In the District Court of the United States for the Wisconsin District.

HENRY C. BOWEN AND OTHERS vs. HENRY O. CLARK AND OTHERS.

1. Two partners cannot make an assignment of all the partnership property and effects of an insolvent firm, to a trustee with preferences, after the third partner has refused to secure any one of the creditors in preference to others, or to distinguish between them, and in his absence, not out of the country, but where he might be again consulted without unnecessary delay.
2. The third partner repudiated the assignment, and he, with the aid of his co-partners and a mortgagee of a portion of his property, who was also a preferred creditor, took the assigned property from the assignee, who refused to sue at law for the property, or its value, unless indemnified against costs and expenses. *Held* that a court of equity should not entertain a bill against all the partners and the mortgagee, to restore the original property to the assignee and firm on account, at the suit of two of the preferred creditors, one of whom had been refused a preference by the non-assigning partner.
3. When the principal assigning partner was laboring under the immediate effects of intoxication, which he had just slept off, at the time of the execution of the assignment, with the full knowledge of the agent of the plaintiff who procured the assignment, and of the assignee; if the circumstance is not sufficient to fix upon the transaction the imputation of fraud, it is suspicious, and should not be favored in a court of equity.
4. A mortgage of a retail store, with possession and a power of disposition reserved to the mortgagor, either in the mortgage or in any other manner, is to be considered a means of hindering or delaying creditors, and void as against executions or attachments. But a court of equity will not entertain a bill, at the suit of preference creditors under an assignment, to avoid a mortgage on this ground against the mortgagors and the mortgagee, who is also a preferred creditor equal with the plaintiffs, unless there is a deficit of assets, and payment of the debt secured by the mortgage is claimed in full.

The opinion of the court was delivered by

MILLER, J.—The bill is filed by two firms—Bowen & M'Namee, and Sachett, Belchor & Co., of New York, who are creditors of the firm of H. O. Clark & Co., which was composed of Clark, Smith, and Justin. This firm being largely indebted, on the third day of July, 1854, an assignment of their stock in trade and choses in action and effects was made to Stevens, in trust. The assignment is in the form of an indenture between Clark, Smith, and Justin, partners, under the name, style, and firm of H. O. Clark & Co., party of the first part, and Charles Stevens of the second part; and it is signed, with seals annexed, H. O. Clark, Ira Justin, A. Ryatt Smith, by H. O. Clark, his partner, H. O. Clark & Co., Charles Stevens. The trust created is to convert all the assigned property into cash; and first to pay in full the claims and demands of Miller, A. Clark, Brewster, and the two firms, complainants; and then all the remaining partnership debts, if sufficient assets, and if not, in proportion.

On the nineteenth of May, previous to the date of the assignment, Clark, Justin, and Smith, by his attorney, Clark, under their respective seals, executed to Brewster a chattel mortgage of all their stock in trade in their store in Jonesville, to secure the payment in six months of the nominal sum of \$16,000, with a schedule of the goods annexed. This mortgage was to secure money loaned and to be loaned, as it might from time to time be required. The mortgage provides that, "until default be made in the payment of the aforesaid sum of money, the party of first part to remain in quiet and peaceable possession of the said goods and chattels, and in the full and free enjoyment of the same; and until such demand be made, the possession of the party of the first part shall be deemed the possession of an agent or servant, for the sole benefit and advantage of his principal, the party of the second part." Smith, intending to be absent at Washington, had given to Clark a general power of attorney to transact his business in his absence. He was at Washington when the mortgage and the assignment were executed.

In the month of June, the firm of H. O. Clark & Co. transferred

these goods and their book accounts and effects to Miller, and took his notes for the consideration; but, in a few days after, this note was received, and the property was returned to the firm. In the meantime, Gilkison, the agent of Bowen & M'Namee, in the presence of Clark, urged Smith, who was then at Jonesville, for security, which Smith declined, he not being willing to distinguish between, or give preferences to, any creditors of the firm. Clark and Justin were the active members of the firm, particularly Clark; and on Smith the credit principally depended. Clark had been drinking, for two days before the execution of the assignment, with the knowledge of the plaintiff's agent and of the assignee. And about the middle of the day, after he had slept off his intoxication, he, in their presence, examined the assignment and suggested the creditors to be preferred. He knew what he was doing, but the assignee thought he had better sign the paper before he got another drink.

Immediately after the execution of the assignment the assignee took possession; and he continued in possession—selling goods at retail and collecting debts—until the thirteenth day of August. When the assignment was executed, and the assignee was placed in possession, Brewster was absent. After Smith returned from Washington he repudiated the assignment, and gave notice of it to the assignee; and he and the other members of the firm, with Brewster (the mortgagee), demanded of the assignee, and (on the thirteenth day of August) took the assigned property from the assignee, without opposition on his part; and he refuses to bring suit for the property, or its value, without indemnity against costs and expenses. While he had the property in his possession, he realised by sales and collections, about four thousand dollars. All the remaining property embraced in the assignment was taken from the assignee: he having mixed the stock of another store with the mortgaged stock in the Jonesville store.

This suit is brought, to enjoin the several members of the firm and Brewster from using, selling, or disposing of the property embraced in the assignment; and to compel them to deliver said property to the assignee, so that he may proceed in the execution of

the trust, and to account; and that the chattel mortgage to Brewster be decreed to be fraudulent and void.

It is well understood, that a mortgage may be held to secure future advances, when this is a constituent part of the original agreement, and so recited. This mortgage did not contain such recital. What portion of the sum of sixteen thousand dollars had been advanced, or was owing, at the date of the assignment, is immaterial at this time.

By the statute law of this state, a mortgage of personal property is not valid against any other persons than the parties thereto, unless possession of the mortgaged property be delivered to and retained by the mortgagee, or unless the mortgage be filed in the office of the town clerk. This mortgage was so filed. But this is a mortgage of a retail store,—the mortgagers continuing in possession, treating the property as their own, and retailing from day to day. By every sale and fresh supply the mortgaged goods changed their identity. I have no doubt that such mortgages are fraudulent as to creditors, and are void as against executions and attachments. Whether the power of disposition exists in the face of the mortgage, or is so understood, or agreed between the parties at the time the mortgage is executed, or is freely to be inferred from its provisions, it is equally void, although it may be filed with the clerk according to the statute. It is to be considered and treated as a means of hindering or delaying creditors,—*Griswold vs. Sheldon*, 4 Comstock, 580; *Truman vs. Ransom*, 4 Law Reg. (for September, 1856), 698, by the Supreme Court of Ohio; and *Jordan vs. Turner*, 3 Blackford, 309.

But this is not a proceeding by attachment or execution on the part of creditors claiming adversely to the assignment. These plaintiffs claim under the assignment, as preferred creditors, equally with Brewster the mortgagee. The demands of the preferred creditors are not specified in the assignment; but their whole amounts are to be first paid, or, in case of a deficit of assets, they are to be paid *pro rata*. These plaintiffs are not in a situation, at present, to contest the validity of the mortgage. Unless there be a deficit of assets, and Brewster claims payment in full, under his mortgage,

to their prejudice, the validity of the mortgage cannot be questioned by them. The repudiation of the assignment, and the reclamation of the property, with the aid of Brewster, do not enable the plaintiffs to question the validity of the mortgage of a creditor equally preferred with themselves. By unpossessing themselves of the property, these parties made themselves trustees for the creditors, and they are bound to account if the assignment is valid and effectual, and should be enforced in a court of equity.

The assignment is signed by Clark as partner of Smith; not as attorney in fact, as the mortgage is signed. The power of attorney is not referred to; and it does not appear on its face to have been intended as an authority to Clark to execute the assignment, nor was it so considered by the parties.

It is a consequence of a partnership, that each acting partner is the general agent of the firm; that is, has an implied authority to act for the firm, in all business within the scope of the business transacted by it. In all that the firm has undertaken to do, or usually does, an acting partner is identified with the company. In the case of *Rogers vs. Batchelor*, 12 Peters, 230, Mr. Justice Story remarks: "The implied authority of each partner to dispose of the partnership funds strictly and rightfully, extends only to the business and transactions of the partnership itself, and any disposition of these funds by any partner, beyond such purposes, is an excess of his authority as partner, and a misappropriation of those funds, for which the partner is responsible to the partnership. Whatever acts, therefore, are done by any partner in regard to partnership property, or contracts beyond the scope and objects of the partnership, must, in general, in order to bind the partnership, be derived from some further authority, express or implied; conferred upon such partner, beyond that resulting from his character as partner." One partner can, in the name of the firm, replenish the stock in trade, and even sell or dispose of it, in the usual course of the business. He can dispose of an article of the stock in trade in payment of a debt of the firm. He can mortgage the stock or dispose of a portion of it to raise funds to preserve the credit or to pay debts of the firm. In the absence of a copartner from the country

the acting partner may assign to a trustee for certain creditors of the firm, the cargo of a certain ship, and of certain debts, to raise funds in aid of the credit of the firm, *Harrison vs. Sting*, 5 Cranch, 289, and under like circumstances, in the absence of one partner from the country who could not be consulted, an assignment of the whole property of the concern, by one partner, was held valid by Marshall, C. J. in *Anderson and Wilkins vs. Tompkins*, 1 Brock. 456. From the opinion in that case, it may be inferred that the chief justice was of the opinion that the authority of the acting partner in this respect, was unlimited, but there is no doubt that the fact of the absence of the partner in England, controlled the decision; as he remarked "It is true Murray, (the absent partner,) had a right to be consulted; had he been present he ought to have been consulted. The act ought to have been, and probably would have been a joint act, but Murray was not present, he had left the country, and could not be consulted. He had by leaving the country, confided everything which respected their joint business, to Tompkins, who was under the necessity of acting alone." In the case of *Pearpont vs. Graham*, 4 Wash. C. C. 132, Mr. Justice Washington remarked, that "It may admit of serious doubt, whether one partner can, without the assent of his associate, assign the whole of the partnership effects, otherwise than in the course of trade, in which the firm is engaged, in such manner as to terminate the partnership. His assignment of all the effects to trustees for the benefit of the creditors of the concern, would seem emphatically to be of this character. Such is the obvious design and such must be its necessary consequence:" and Mr. Justice Story, in his work on Partnership, §101, note, on a review of the cases, concludes, that there is no small difficulty in supporting the doctrine even under qualifications, that one partner may make a general assignment of all the partnership property.

The authority in a single partner to dispose of partnership property, is not an inseparable legal consequence of an interest in the partnership, but is an actual agency, implied from the supposed assent of the other members; an express notice, therefore, from one member of the firm, that he will not be bound by the act of another

partner puts a stop to the implied authority. See 1 Am. Leading Cases, 292, and cases cited. This agency does not exist where the partners are present, or can be consulted. In *Anderson and Wilkins vs. Tompkins*, it is asserted that "this power would certainly not be exercised in the presence of a partner without consulting him; and if it were so exercised slight circumstances would be sufficient to render the transaction suspicious, and perhaps to fix upon it the imputation of fraud. In this respect, every case must depend on its own circumstances." In *Deckard vs. Case*, 5 Watts, 22, an assignment by one partner directly to certain creditors to pay debts of the firm, after the other partner had left the country was sustained on the principle of an implied power of a partner to dispose of the whole partnership effects, as held in *Mills vs. Barber*, 4 Day, 428, and in *McCullough vs. Summerville*, 8 Leigh, 415, and other cases; but the peculiar facts of such cases were urged in support of the decision.

In *Hennessy vs. The Western Bank*, 6 Watts & Sergeant, 300, the same principle was maintained in the case of a general assignment, with preferences of partnership effects to trustees, executed by two of these partners, in the absence from the country of the third partner—but the absence and a power of attorney of the third party are recited as the authority under which they executed the assignment. But in the case of *Dechert vs. Filbert*, 3 Watts & Sergeant, 454, it is decided that one of a firm has not power to make an assignment of the effects of the partnership for the benefit of creditors, against the express dissent of his co-partner. That assignment was made after the dissolution of the partnership by advertisement, but the dissent of the non-assigning partner was the ground of the decision. See also *Kerby vs. Ingersoll*, 1 Harrington, 172; *Hughes vs. Ellison*, 5 Missouri, 463; *Drake vs. Rogers*, 6 Id. 317. In *Hitchcock vs. St. John*, 1 Hoffman, 511, the assignment was made in New York, while the absent partner was in Georgia, and it was declared void. In *Dona vs. Sull*, 17 Vermont, 390, the assignment was declared void, for being made by one partner, who had the superintendence and care of the business, while the other partner, who resided at a different part of the State,

was absent, and was not consulted. In *Deming vs. Colt*, 3 Sandford's Rep. 284, and in *Hayes vs. Heyer*, 2 Id. 284, assignments made by one partner without the knowledge or assent of the other partner, who was present, or might have been consulted, were adjudged void. So also in *Honens vs. Hussey*, 5 Paige, 30, an assignment to a trustee, for the benefit of creditors, giving preferences of the stock in-trade by one partner, while the other was objecting to it, was adjudged to be fraudulent as to that partner, and void. The Chancellor expressed his satisfaction, "that such an assignment is both illegal and inequitable, and cannot be sustained." The principle upon which an assignment by one partner in payment of a partnership debt rests, is that there is an implied authority for that purpose from his co-partner, from the very nature of the contract of partnership; the payment of the company debts being always a part of the necessary business of the firm. And while either party acts fairly within the limits of such implied authority, his contracts are valid and binding on his co-partner. One member of a firm, therefore, without any express authority from the other, may discharge a partnership debt, either by the payment of money, or by the transfer to the creditor of any of the partnership effects, although there may not be sufficient left to pay an equal amount to the other creditors of the firm. But it is no part of the ordinary business of a co-partnership to appoint a trustee of all the partnership effects, for the purpose of selling and distributing the proceeds among the creditors in unequal proportions. And no such authority as that can be implied. And in *Fisher vs. Murray*, 3 Law Rep. (N. S.) 589, it was held, that to support an assignment of the whole of the partnership property to a trustee, for the payment of debts, by one partner, or any number short of the whole, even without preferences, it must be shown that it was made under circumstances that rendered it impossible to consult the other partners; or from their acts or declarations, either before or subsequent thereto, it must appear that it was executed with their assent, or by their authority.

The Court of Errors of New York, in the case of *Mubbett vs. White*, 2 Kern. 443, by a vote of five judges to two, expressed the opinion of the majority, that one partner has authority to sell and

transfer all the co-partnership effects, directly to a creditor of the firm in payment of a debt, without the knowledge or consent of his co-partner, although the latter is at the place of business of the firm, and might be consulted; and that such transfer is valid, although the firm is insolvent, and thereby one creditor acquires a preference over the other creditors of the firm. This was in fact a controversy at law between creditors of the firm; and there was evidence, although contradictory, of the subsequent assent of the non-assigning partner. That decision virtually rejects the principle of implied agency; and, in my opinion, it can only be sustained, if at all, upon the ground, which was not stated by the majority, that in a controversy at law between creditors, one creditor cannot object to the validity of such an assignment to another creditor; but that the non-assigning partner alone can make the objection. Such is the law, in case of a judgment confessed by one partner against himself and his co-partners. The judgment is valid until reversed, or set aside at the instance of the non-confessing partners; and a sale under execution issued on such a judgment will vest a good title in the purchaser of the partnership property. Nor can third persons or creditors object to such judgment or sale. *Grier vs. Hood*, 1 Casey Pa. Rep. 430.

From an examination of the cases, it will be found that some peculiar and controlling circumstance influenced the decision. A distinction seems to exist in some of the cases between assignments directly to creditors in discharge of debts, and assignments to trustees, giving preferences to creditors. And if such distinction really exists, then there should be a difference in the effect given to the one in a suit at law between creditors, and to the other in a case of equity, by a preferred creditor against the non assigning partner.

The property of a co-partnership, upon the insolvency of the firm, is considered in equity, as a trust fund for the payment of the partnership creditors generally; and equity should be slow to enforce an assignment at the suit of a preferred creditor. A court of equity will readily enforce the trust and grant relief in cases where the assignment is for the creditors generally, upon the favorite maxim that equality is equity. This principle of equality has always been

a favorite with a court of equity; but it has not been adopted as a principle of the common law. This inequitable principle of the common law is, however, being modified by legislation. In the two great commercial states of New York and Pennsylvania, assignments with preferences to creditors are now prohibited by statute; and no doubt the prohibition will become general. Such assignments have only been tolerated upon the principle that the owner of the property has a right to make disposition of it in payment of his debts. The courts require that all assignments should be fair, and *bona fide*, and not tainted in the smallest degree with fraud; and even then, such as give a preference to a creditor or creditors, are not favored in a court of equity.

The principle to be extracted from nearly all the decisions, appears to be this, "that as a general assignment, if it does not dissolve the partnership, at least takes away from the partners the right of disposing of the effects assigned; all the members, if they are present, have a right to be consulted upon such a step; that an assignment by one partner against the known wishes of the other, would be a fraud upon him, and invalid; and an assignment without his knowledge would be presumptively so. But if one partner has left the country, he must be considered as having vested in the other implied authority to act in all matters for the benefit of the firm; and an assignment under such circumstances, if fairly made and beneficial to the interests of the company, will be sustained." 1 Am. Lead. Cases, 444. Smith was not absent from the country; but he was at Washington, where he might have been written to or seen personally in four days, or telegraphed to in one day. Especially was this the duty of the agent of the plaintiffs, and Clark, as they had full notice from him of his objection to preferring any of the creditors of the firm. Smith's assent to the assignment was essential, under the circumstances, to its validity, as to him. If he, on his return, had acquiesced in the assignment, he would be bound by it; but on the contrary, he gave notice of his dissent to the assignee, and carried it out, with the aid of his co-partners and of the mortgagee, by regaining possession of the property. When Smith objected to giving these creditors security, in preference to others, the pro-

perty was in the possession of Miller, but the firm had then the avails of the sale to Miller, whatever they were. The return of the property, by Miller to the firm, does not vary the matter in the least, or justify the presumption that Smith had come to any different conclusion upon the subject of a preference.

The assignment is valid as to Justin; and Clark's intoxication is not established by the proof to an extent that should authorize the court to pronounce the assignment void as to him. When he executed the assignment he knew what he was doing; he was not deprived of his reason and understanding. "Courts of equity, as a matter of public policy, do not incline on the one hand, to lend their assistance to a person who has obtained an agreement or deed from another in a state of intoxication; and on the other hand, they are equally unwilling to assist the intoxicated party to get rid of his agreement or deed, merely on the ground of his intoxication at the time. They will leave the parties to their ordinary remedies at law, unless there is some fraudulent contrivance or some imposition practiced." 1 Story's Eq. Jur., § 231.

It is not satisfactorily proven that imposition was practiced upon Clark by the plaintiff's agent, who procured the assignment; but he and the assignee had full knowledge of Clark's intoxication while the assignment was being written; and that he was laboring under its immediate effects at the time of its execution. They knew that Clark was acting in the matter for Smith, as well as for himself; and with a due regard to the interests of Smith, they should have postponed the execution of the assignment until it could be done with care and deliberation, by a sober man. If this circumstance is not sufficient to fix upon the transaction the imputation of fraud, it is suspicious, and should not be favored in a court of equity.

My opinion is, that the complainants have not a proper case for equitable interposition by this court, and that the bill should be dismissed.

In the Supreme Court of Indiana, November Term, 1856.

THE MADISON AND INDIANAPOLIS RAILROAD COMPANY vs. WHITENECK.

1. The right of trial by jury may be waived, and such waiver will be valid.
2. The fundamental principles of civil government discussed, and authorities cited.
3. The courts cannot annul an act of the legislature simply because it violates the fundamental principles of *correct* legislation, but may because it violates the fundamental principles of the Constitution.
4. A law may be constitutional in part, and unconstitutional in part, hence, a law which enacts that railroads shall fence, as to that provision is a reasonable regulation, but where it inflicts a penalty upon an appeal, it is unconstitutional and void.

The opinion of the court was delivered by

PERKINS, J.—Suit commenced before a Justice of the Peace to recover the value of a heifer killed by a locomotive on the Madison and Indianapolis Railroad. Recovery before the justice, and appeal to the Common Pleas. In that court, the defendant not appearing, judgment was rendered for plaintiff without the intervention of a jury, for double the amount of the judgment before the justice, &c.

A point is made which may be briefly disposed of before entering upon the main questions in the cause.

It is said, a jury should have been called to assess the damages, notwithstanding the failure of the defendant to appear, as the case stood upon the general issue.

The constitution of our State does not say that trials shall be by jury. It says the "right of trial by jury shall remain," &c. If a party voluntarily abstains from claiming the right in a given case, we think it may be judicially held that it is waived. Hence, the statute enacting that such act shall be regarded as a waiver is valid. 2 R. S. 115.

The suit was instituted under the act of March 1st, 1853, Laws of 1853, p. 113, relative to compensation for animals killed or injured by railroad machinery; and as the act is short and gives

rise to several somewhat weighty questions now to be considered, we insert it, except the repealing section, in this opinion. It follows :

"An Act to provide compensation to the owners of animals killed or injured by the cars, locomotives or other carriages of any railroad company in this State. Approved March 1, 1853.

SECTION 1. *Be it enacted by the General Assembly of the State of Indiana*, That whenever any animal or animals shall be killed or injured by the cars or locomotives or other carriages used on any railroad in this State, the owner thereof may go before some justice of the peace of the county in which such injury occurred, and file his complaint in writing, and such justice shall fix a day to hear said complaint, and shall cause at least ten days' notice to be served on the railroad company defendant, by service of summons by copy on any conductor of any train passing through said county.

SECT. 2. On the hearing of said cause, the justice or jury trying the same shall give judgment for the plaintiff for the value of the animal destroyed or injury inflicted without regard to the question whether such injury or destruction was the result of willful misconduct or negligence, or the result of unavoidable accident.

SECT. 3. If the defendant shall appeal from such judgment, and shall not reduce the damages assessed twenty per cent., the appellate court shall give judgment for double the amount of damages assessed in such appellate court, and a docket fee of five dollars.

SECT. 4. This act shall not apply to any railroad securely fenced in, and such fence properly maintained by such company."

It is contended that this act is unconstitutional—

1. Because the object of it is not indicated in its title. It is claimed to be, in fact, an act to compel railroads to fence in their tracks, and to inflict penalties on the exercise of the right of appeal.

2. Because it is a special act. And,

3. Because it violates private right.

It is further insisted that its third section is unconstitutional, because it impairs the right of appeal.

1. We do not think the whole act void for inconsistency with its title. Its immediate purpose is there expressed. The act contains an exception as to railroads that are fenced; but we think the exception so properly connected with the subject matter of the act designated in the title, as rightly to appear in it under that title.

2. We do not think the act void simply because it is special. There is no provision of the constitution prohibiting, in terms, special legislation on the subject of railroads; and, from the peculiar character of the subject, we cannot say such legislation may not be proper. Special subjects may require some special legislation; and when it takes place, it will be for the court to judge, as in the Clay county case and the Lafayette murder cases, under section 23 of article 4, of the constitution, whether more general legislation could reasonably have been made applicable; 5 Ind., 4 and 7 Ind. 326; and also whether such special legislation conflicts with any other constitutional provision.

3. The act is alleged to infringe private right and principles of natural justice, because it makes requirements of railroad companies beyond those contained in the laws under which they are organized, and unwarrantably interferes with the prosecution of business pursuits; and it is insisted that the legislature cannot thus act for want of authority.

This objection brings up to some extent, the general question of the power of the legislature over the various pursuits of the people of the State, in other words, of legislative power; and we propose to avail ourself of the occasion to express somewhat at length our views upon it. What, then, is the legislative power of this State? The answer to this question must be drawn from an examination of the constitution. Turning to it we find article 3 to provide that the powers of government shall be divided between three departments, and section 1, of article 4, to declare that, "The legislative authority of the State shall be vested in the General Assembly."

But so far, these sections, it will be observed, do not define that legislative authority; they simply ordain a division of powers and designate the department in which the legislative, whatever it may be, shall be lodged. The distribution of the powers of government,

as a distinctive feature in their creation, among different departments, is a comparatively modern idea, suggested by the accidental development, in that form, to a great extent, of the British government, and probably first, formally enunciated to the world as an invaluable precept in the science of politics, by the celebrated Montesquieu, of Bordeaux, in France, in his *Spirit of Laws*, published about the middle of the 18th century. Such division, therefore, does not necessarily follow upon the simple organization of a government. Hence it became imperative, in order to insure a distribution of powers in the government of this State, to provide for it in the organization. Madison, in No. 47 of the *Federalist*.

The legislative power, then, being as yet simply located, the inquiry still occurs, what, how great, is that power? Is it unlimited? This question has been much discussed of late, in several cases, and deserves most careful consideration in its final determination. It has been asserted by some that "the legitimacy of all laws originates, not in the will of him or them who make the laws, whoever they may be, but in the uniformity of the laws themselves to truth, reason, and justice,—which constitute the true law."—Guizot on *Rep. Government*, pp. 204, 217. And if we add the further proposition of some religious, moral, and political philosophers, that it is the right of every man to judge of this conformity to justice of each law, and to obey or disobey it accordingly, we have complete, what is called in this day, the "higher law" doctrine; a doctrine consistent with the individual independence of man, but utterly inconsistent with, and impracticable in, orderly government.

In such a government the legitimacy of laws must rest in the will of the law-making power. It must be so, or government is nothing. Still, there are subjects and matters in relation to which no government should assume to control the will or action of any individual. This we shall make appear in the course of this opinion. Hence, the law-making power should be limited. Yet, from its very nature, it would seem that, practically, limits could scarcely be set to its exercise except by written constitutions; nor by these, without the existence of a power to annul laws enacted outside of the limits established; and, historically considered, we do not find that it had

been thus limited prior to the formation of the American States. True, Great Britain had, before that time, her Magna Charta and Petition of Right, but they were not ordained by the people in their sovereign capacity, and were not, in fact, paramount to acts of Parliament, however much deference might, under ordinary circumstances, be paid to them. Parliament remained, in reality, omnipotent. No power tested its enactments by a constitution.

Nor would the legislative power necessarily be limited by a written constitution. That might simply provide for a government, without any restriction upon its power, or it might expressly confer unlimited power. In either of these cases its power would, doubtless, be absolute; if not morally, at least practically.

But a constitution might limit the legislative power. It might do this either by specifying the cases in which alone the power should be exerted, or it might confer the power generally, subject to certain limitations, in which even the power would remain indefinite, unlimited wherever limitations did not operate. This latter is the case of the constitution of Indiana. Our legislature is not by abstract moral right, but in actual fact, absolute, where not restrained by that instrument. *Doe vs. Douglass*, 8 Blackford, 10.

The legislative power in this State, where the constitution imposes no limits, must be practically absolute whether it operate according to natural justice, or not, in any particular case, for when a law is created by the legislature, the executive must enforce it, and is vested with control of the military power of the State to enable him to do it; and, aside from the physical power of the united people of the State, there is no power to arrest the execution except the judiciary, and that department can only do it when the law conflicts with the constitution. It cannot run a race of opinions upon points of right, reason, and expediency with the law-making power. *Herman vs. The State*, 4 Am. L. Reg. 344. *Bee-bee vs. The State*, 5 Ind. 501.

The great point of difficulty here, therefore, must ever arise in determining the meaning, the extent of operation of the declaratory and expressly restrictive provisions of the organic law—the reservations in the bill of rights—in short, the implications of the consti-

tion. Such it was in the case of *Beebe*, supra. May the judiciary pronounce a law void because of repugnance to the fundamental principles of the government declared in the constitution as being prohibited by implication, though not in express words? Or because of repugnance to the clear scope and intention, the spirit of express restrictions as being impliedly embraced by them? These are now the questions. For example, the first section of the article of the "Bill of Rights," declares that all men are endowed with unalienable rights, among which are life, liberty, &c. Now, how broad a meaning is to be given to this section? With what view or object was it inserted in the constitution? What should be its interpretation? We shall enter upon no discussion of man's power of alienation, and no criticism of the word "unalienable." See *Lieber* vol. 1, p. 218. We shall not insist upon the philological accuracy of its use. We shall not dispute but that primordial or imprescriptible or unalienated might have been better used. We shall only endeavor to ascertain the meaning with which the term "unalienable" was used. And if, to express that certain rights had not been alienated, and ought not to be, a term was used which meant that they could not be, it does not weaken the force or clearness of intention in the expression.

We proceed, then, to the work of interpretation. In *Prigg vs. Pennsylvania*, 16 Pet. on page 610, it is said that "perhaps the safest rule of interpretation (of the constitution) after all will be found to be, to look to the nature and object of the particular powers, duties and rights, with all the light and aids of contemporary history, and to give to the words of each just such operation and force, consistent with their legitimate meaning, as will fairly secure and obtain the end proposed." To the same effect, *Martin vs. Hunter*, 3 Cond. Rep. on p. 557; 1 Kent, 448; *Federalist*, No. 78; *Smith on Statutes*, p. 418, Sec. 276. Guided by this rule, let us proceed to seek the true interpretation of the first section of the Bill of Rights above quoted. We examine it in the light of contemporary history.

The monarchies of Europe were formerly, if they are not now, administrated upon the principle that the people were utterly destitute of all rights, and entirely at the mercy of government. In the

17th century the principle was not only thus acted upon, but it was maintained in formal treatises as being in accordance with the will of God. The tyranny exercised upon the people, under this doctrine, roused attention, excited inquiry as to, and led to the denial of, its soundness. Men, with minds liberalized, enlightened, and invigorated by the perusal of recovered ancient learning, and hearts warmed by the eloquence of ancient freedom, entered upon the study of the science of the rights of man, and arrived at the conclusion that he was possessed of such by nature which it was tyranny in government to invade. Such statesmen and scholars as Buchanan, Harrington, Milton, Sidney, Fletcher, Vane, and others, perhaps their equals, among whom it is not improper to include the illustrious and excellent William Penn, ably answered the writings of Filmer and other advocates of despotic power. The controversy waxed warm and spread widely. It enlisted the nation. It came with the colonists to America, and was prolonged. Great Britain practiced upon her maxims of absolutism in governing here, disregarding the rights of person and property. The people denied the justice of her administration, and made a question upon their natural rights. Histories of the Revolution, *passim*. The discussion of the question extended to France, and there, as it had done in England and in America, produced a revolution. The French convention, pursuant to suggestion of Lafayette, 3 Mod. Europe, 186, Mack's Life of Lafayette, 219, declared :

"The end of all political associations is the preservation of the natural and imprescriptible rights of man; and these rights are liberty, property, security, and resistance of oppression." 2 Paine's Pol. Works, 112. And, per Lafayette, in that convention: "Every man is born with rights inalienable and imprescriptible; such are the liberty of his opinions, the care of his honor and his life, the right of property, the uncontrollable disposal of his person, his industry and all his faculties; the communication of all his thoughts by all possible means; the pursuit of happiness and the resistance of oppression."

"The exercise of natural rights has no limits, but such as will insure their enjoyment to other members of society." Mack,

supra. And see the same in Cutter's, and in Headley's Life of Lafayette. This declaration, Burke, who, alarmed at innovation, had abandoned liberal principles, undertook, in his "Reflections," &c., to refute; and, as to the British nation, contended that if its people ever had any rights, they had formally alienated them, made "as solemn a renunciation of them as could be made," by a declaration to King William, on his accession to the throne, that: "The Lords spiritual and temporal, and Commons, do, in the name of all the people aforesaid, most humbly and faithfully submit *themselves, their heirs and posterities forever*," &c. 1 Burke's Works, Dearb. Lib. Ed., on p. 463.

These reflections of Burke drew forth replies—among them, Paine's Rights of Man, and Sir James Mackintosh's powerful "Defence of the French Revolution," in which he vindicates the declaration of man's natural rights, and proves the unsoundness of Burke's doctrine. "This doctrine," says he, "thus false in its principles, absurd in its conclusions, and contradicted by the avowed sense of mankind, is, lastly, even abandoned by Mr. Burke himself. He is betrayed into a confession directly repugnant to his general principle, viz: Whatever each man can do without trespassing on others, he has a right to do for himself," &c.

Again: "The existence and perfection of these rights being proved, the first duty of law-givers and magistrates is to assert and protect them. The moment that the slightest infraction of these rights is permitted through motives of convenience, the bulwark of all up-right politics is lost. If a small convenience will justify a little infraction, a greater will expiate a bolder violation; the Rubicon is past." Mackintosh's Miscel. Works, pp. 590, 591, 592. Pending this great discussion the people of the United States came to a decision upon the question in controversy and thus declared it. "We hold these truths to be self-evident—that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty and the pursuit of happiness; that to secure these rights governments are instituted among men," &c. Dec. of Independence. This declaration was framed and adopted by men of no mean judgment and who under-

stood and weighed the language used. The States severally, most of them, proceeded to ordain constitutions of government in which they said ; for example, as in that of Pennsylvania :

“That the general, great and essential principles of liberty and free government may be recognized and unalterably established, we declare :

“That all men are born equally free and independent, and have certain independent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing happiness.” And they declared that everything in the Bill of Rights was excepted out of the general powers of government, and to forever remain inviolate.

In the constitution of Delaware, thus :

“Through divine goodness, all men have by nature the right of worshiping and serving their Creator according to the dictates of their consciences, of enjoying and defending life and liberty, of acquiring and protecting reputation and property, and, in general, of attaining objects suitable to their condition, without injury one to another ; and as these rights are essential to their welfare, for the due exercise thereof, power is inherent in them,” &c. *Accord*, Kentucky, Ohio, Indiana, in 1816, and other States. Connecticut in 1818, till which time she had lived under her colonial charter, and Rhode Island, who had thus lived till 1843, when she also formed a constitution. Placing ourselves thus amid the circumstances in which the framers of our early State constitutions stood at their formation, and from thence interpreting them, and ours as a substantial copy, what force should be conceded to the first article of the Bill of Rights which we have quoted ? The purpose for which it was intended appears to be plain enough, and also the great importance attached to it. The monarchies of Europe maintained the doctrine that the people had no natural rights, and hence, might rightfully be controlled at will and without limit by the government. The people in this country denied the doctrine and determined to emancipate themselves from it.

The governments of Europe practiced upon their principles and disregarded all rights in the people in administration. They regu-

lated everything by law, even, on occasions, "the subsistence of the people." The hand of authority was seen in everything, and in every place." They were actuated by "a restless desire of governing too much." Burke, *supra*, vol. 2, p. 192; and see Stevens' Lectures on France, p. 17.

These abuses, oppressions, the people of this country determined to prohibit here; they determined to be, in the language of some of the constitutions, secure from their exercise upon themselves or their posterity. That security they designed should be perpetuated by their constitutions, and particularly by the clause in question.

In the great discussion of which we have spoken above, a proposition had been submitted, for the first time in the history of the world, thinks Mr. Sparks, by Sir Henry Vane, that "restraint be laid upon the Supreme power as a FUNDAMENTAL CONSTITUTION," that it might be "bound up" so that "this great blessing (of freedom of conscience) will hereby be so well provided for, that we shall have no cause to fear." Sparks' Am. Biography, vol. 4, pp. 262, 263.

Such was the object and intention of the framers of our constitution, in regard to natural rights. They designed the first section of it as a fundamental provision, binding up the supreme power. It was necessarily general. They could not look down the stream of time and see all the cases wherein it would be proper for a State government to exert legislative power, specify them and exclude all others, thus protecting the rights reserved; nor could they anticipate all the various attempts that might be made to invade these rights, and expressly prohibit them. They did specially prohibit such as they had experienced. But naming such attempts did not exclude the prohibition of others by the general fundamental provision. *The State vs. Barbee*, 3 Ind. 258; *Thomas vs. The Board*, *fcc.*, 5 Ind. 4. Further, we may say that these restraints were intended to operate upon the legislative power, though we suppose that this will not be denied. Parliament had most severely outraged the rights of America. The colonists "knew it to be their most dangerous enemy." 6 Bancroft, 138. It had enacted laws prohibiting certain pursuits in America. 1 Botta's Hist. 25, 26.

The judges of England, in answer to a question by Cromwell, Earl of Essex, had reluctantly said, that if parliament should condemn a man to die without a hearing, it would be valid. Hallam's Const. Hist. p. 28. Mr. Jefferson urges as an objection to the Constitution of the United States, the want of a Bill of Rights. In a letter to Col. Humphreys, in 1789, he says :

"I am one of those who think it a defect, that the important rights not placed in security by the power of the constitution itself were not explicitly secured by a supplementary declaration. There are rights which it is useless to surrender to the government, and which the governments have yet always been found to invade. These are the rights of thinking and publishing our thoughts by speaking or writing ; the right of free commerce ; the right of personal freedom."

"We are now allowed to say, such a declaration of rights, as a supplement to the constitution where that is silent, is wanting, to secure us in these points. The general voice has legitimated this objection." Jefferson's Works, vol. 3, p. 13. The States, in their several constitutions, obviated, as to them, the objection. Such a declaration, Mr. Jefferson admitted, would place a check in the hands of the judiciary. 1 Tuck. Life of Jefferson, 281.

Having thus ascertained the intention of the section in question, it is the duty of the court, so far as is consistent with its language, to give effect to it accordingly. The mere demarcation on parchment of the constitutional limits is not a sufficient guard against the encroachments of tyrannical legislation. The early history of Virginia establishes this ; and of Pennsylvania. In this latter State, in 1783, and 1784, a council of censors assembled, charged with the duty of inquiring "whether the constitution had been preserved inviolate ;" and they reported that it "had been flagrantly violated by the legislature in a variety of important instances." Madison, in Federalist, No. 48. "Liberties are nothing until they have become rights—positive rights, formally recognized and consecrated. Rights, even when recognized, are nothing so long as they are not entrenched within guarantees. And lastly, guarantees are nothing so long as they are not maintained by forces inde-

pendent of them, in the limit of their rights. Convert liberties into rights, surround rights by guarantees, entrust the keeping of these guarantees to forces capable of maintaining them—such are the successive steps in the progress towards a free government.” Guizot on Rep. Gov. 302.

“The courts of justice are to be considered the bulwarks of a limited constitution.” Federalist No. 68. “The courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. Ibid and 2 Lieber, pp. 280, 281, 282.

We come to the conclusion, then, that the courts should declare void a law in violation of this fundamental principle of the constitution, a law in violation of the natural rights of man. To be explicit. The courts cannot annul an act of the legislature simply because it violates the fundamental principles of correct legislation; but because it violates a fundamental principle of the constitution. 2 Lieber, 602; 6 Ind. 87, 88, 96; 1 Kent, 450, note; *Martin ex parte*, 8 Eng. Ark. 198. The act annulled according to the expression always used touching the subject, must be *unconstitutional*.

It has been said, indeed, by high authority that “there are certain absolute rights and the right of property among them, which, in all free governments, must of necessity be protected from legislative interference, irrespective of constitutional checks and guards.” 7 Blackf. 477. And the dictum is supported by eminent jurists and writers of celebrity. American Law Magazine, vol. 1, p. 319 (1848) and the cases there cited. Junius, vol. 1, p. 88, in dedication.

But this doctrine would not be admitted in the English courts where there is no written constitution, and cannot arise here, because, as we have seen, our constitution does protect these natural rights.

Again, it is sometimes said the courts may pronounce an act void because not properly within the scope of legislative power; but this is also by virtue of the constitution; for that instrument ex-

pressly declares that the powers of government shall be divided between three departments, the legislative being one, and it expressly inhibits either from acting out of its assigned sphere; art. 3; hence, the constitution, in fact, prohibits the passage of any act by the legislature not properly within the scope of legislation.

We here take leave of this topic, remarking that as our system of polity was framed by politicians—using the word as a synonym of statesmen, not of politicians—we have necessarily been led, in construing it, to study and cite the opinions of that class during the period of its formation. The review has considerably extended this opinion; and the propriety of the course is justified in the language of a section of the first constitution of Ohio, art. 8, sec. 18, "That a frequent recurrence to the fundamental principles of civil government is absolutely necessary to preserve the blessings of liberty."

And per Mackintosh *supra*, "Perhaps the only expedient that can be devised by human wisdom to keep alive public vigilance against the usurpation of partial interests, is that of perpetually presenting the general right and the general interest to the public eye."

If it be said that the principles asserted will sometimes thwart the will of a majority, we answer, it is admitted; but what then? Ours is not, as were, to some extent, the ancient republics, a government directly of masses and majorities, but is

1. A government by representatives.
2. With limited powers.
3. With those powers divided among departments.

4. With one department having the ultimate right to decide upon the respective powers of all, and to annul action beyond the limits of those powers. It is, in short a government within a constitution. The majority, here, cannot do everything, much less, a plurality which elects our legislature. The majority rules when all act within the limits of the constitution. If a majority or plurality may do what it pleases, and this is to be the rule without limitation, the constitution should be at once abrogated, and leave us a legislature as omnipotent as the British parliament. Till this is done we must uphold the restraints of the constitution, wisely imposed by

the people themselves, upon the action of majorities and the usurpations of the legislature. Minorities, here, have some rights as against majorities, and all have some security from legislative tyranny. In the restraints of the constitution lie the liberties of the people. If it be said we thus deprive the legislature, to some extent, of power to do good, we admit it; but we also deprive it of power to do evil. Unlimited power in mortal hands is always abused. We only attempt to confine that of the legislature within the limits the people, by their fundamental law, assigned to it—limits fixed after probabilities of good and of evil had been weighed and balanced; and if those limits are unsatisfactory, the fault is of the constitution not of us. It should ever be remembered that ours is a government that seeks to reconcile public order with private right and individual liberty. And if it is found that this cannot be done to perfection, it is to be considered in reference to the ordaining of a new constitution, whether any, and if so, how much of individual excess is to be tolerated as a lesser evil than the subjection of the people to despotic power. See Lieber on Liberty and Self-Government, passim. "Tyranny and mere tranquility," says Lieber in his Political Ethics, vol. 2, pp. 4, 6, "are things for which men may be trained, into which they may be forced. There are no more quiet and peaceable people on earth than the Chinese." They have a saying: "Better a dog in peace than a man in anarchy." "Rather however," says Lieber, "all the disturbance of the West, so that it be a fermentation which promises a better, purer State, than Chinese peace and stagnation." See on this point *Herman vs. The State*, 4 Am. L. Reg. 344.

The natural rights of which we have spoken, let it be observed, are not rights of vagrancy; but they inhere in man as a necessity of his nature; they belong to him because he is a man, and because he would not exist as such without their exercise. Life was the gift of his Creator, but life is not in man, self-sustaining; it must be prolonged by nourishment and protection of the body. Hence, man must have food and clothing. The demand of nature is absolute. God has given the earth and the abundance thereof whereby to supply this necessity; and limbs, and intellect, ingenuity, by the

use of which, food and raiment, property, may be obtained, upon and out of this earth and in no other manner — these are the gifts and necessities of nature, and belong to man as man. God has also made man a moral being accountable directly to Him in respect to their mutual relations. Hence, no human authority can step between this accountability and man's Maker, and final Judge; and, hence, man's natural, necessary right; duty, even, to worship his Maker in such a manner as he will be willing to be accountable for. The race of man is perpetuated by a communion of the sexes, and parental care of offspring. The sexes are about equal in number. Every man, therefore, has the natural right to one wife and no more—monogamy is the law of nature. We thus discover that the idea of unlimited sovereignty in one man or any number of men over another is unjust, unreasonable, violative of his moral nature, unwarrantable tyranny. In this manner are man's natural rights ascertained, defined, limited, rendered as certain as any other facts. As to some of them most publicists are now agreed. Others are to be determined. As enumerated by Lieber, in his work on Political Ethics, these rights are substantially: 1, Life; 2, Personal Liberty; 3, Free Agency; 4, Resistance to oppression; 5, Trial by law before Condemnation; 6, Right of Utterance, Communion, Speaking and Writing; 7, Reputation; 8, Security of Person, Family, &c.; 9, Freedom of Conscience, Worship, &c.; 10, Property, including Commerce. Traffic, he insists, "is a necessary right, exercised, according to history, from the origin of society, growing indispensably out of the necessary division of labor." Exchange is one of the most lawful, necessary and natural means of acquisition, founded in the variety of soil, clime, genius of people, agents of nature, &c. and one of the first and most effective means of civilization. Exchange lies in the great order of things;" (see also, 1st vol. Tucker's Life of Jefferson, pp. 58, 59,) and would alone warrant another primordial right, viz; 11, That of locomotion, going where one desires. Vol. 1, p. 192, et seq. of Lieber.

But notwithstanding the legislature cannot prohibit, it may regulate the exercise of natural rights, and all pursuits and practices of its citizens. We do not propose to elaborate this branch of the-

subject at length, but lay down the following propositions as expressing the result of our reflections upon it.

1. No man has a right to pursue a business or practice *malum in se*, entirely evil in itself. Example: The manufacture and sale of counterfeiting apparatus and counterfeit money. These articles are not and cannot be supplied to the public to meet any want, or for any useful purpose. They are made with the sole intent of cheating and defrauding. So the practices of gaming, drawing lotteries, &c., are no reasonable modes of exchange on equivalent considerations, but tricks to cheat the unwary.

2. The legislature may prohibit such pursuits and practices.

3. Every man has a right to pursue any and every business or practice not evil in itself, which the wants, appetites, fashions, and follies even, of community invite to. Lieber, vol. 1, pp. 159, 160. And,

4. The legislature cannot absolutely prohibit such pursuits. This must be admitted or it must be admitted that all pursuits are at the sufferance of the legislature—the doctrine in England, where there is no constitution, and of a late case in Delaware, *The State vs. Almond*, which ignores the bill of rights and constitution of that State, following as it does, to the fullest extent, Blackstone's idea of liberty under the British government. A. L. Register, vol. 4, p. 533. But,

5. No man in the prosecution of his lawful business or practice has a right intentionally or carelessly to annoy or injure another. And, hence,

6. The legislature has a right to establish reasonable regulations in relation to such business or practice calculated to prevent the occurrence of such injury. The exercise of this right is analagous to requiring security for good behavior, keeping the peace.

These regulations may relate :

1. To time. Examples: Preventing railroad trains, coming from any infected point, entering any other inhabited place—preventing the running of trains on Sunday, &c.—suspending the exercise of any and every right during temporary emergencies in war and rebellion, as in the case of the writ of habeas corpus.

2. To place. Examples: Auction sales under the windows of a church in time of service. Sales of liquor near the grounds of a camp meeting—offensive trades, such as slaughtering establishments, &c., in cities, &c., and storing, and building of, combustible materials where they would endanger the security of life and property of others, without fault on their part.

We say without fault on their part, for it is a well settled principle of common and maritime law that a person cannot complain of an injury that his own fault inflicts. And with a poor grace would it be asked that the running of locomotives and cars should be entirely prohibited because some persons might be foolish enough to place themselves upon the road track and be run over; or that the use of ropes should be prohibited because hypochondriacs and those disappointed in business or love, might occasionally hang themselves by them.

3. To manner, occasion, &c. Rapid driving through the streets of a crowded city—sales or gifts knowingly made of dangerous articles, to lunatics, drunken men, idiots, minors, &c., being persons incompetent to properly use them, and likely to use them to others' injury.

Says Lieber, *Pol. Eth.* vol. 1, p. 200 :

“It is not said that utterance, though necessary for me in my character of man, may not be regulated or suspended. Though I have as man the indisputable right of utterance, I have not the right to use it everywhere and on all occasions. So does my right of locomotion not entitle me to go where I choose, into my neighbor's field, closet, &c. I am not allowed to speak loud in church, in a deliberative assembly.”

Usury laws are another instance of regulation. “But all these are exceptions, as by way of exception, the police may examine my rooms, whether I ventilate them properly in times of a general infection.” Lieber. Generally, in these cases, it is for the judiciary, in the last resort, to judge of the consistency of regulations made by the State or cities with the constitutional rights of the citizens. Trades and practices must be tolerated so far as they are properly used; they may be restrained at the point where they

begin to be abused. Public policy encourages trade, and incites to inventions, leading to new pursuits, by rewarding the successful. Contracts in general restraint of trade are void at common law, as are contracts in full restraint of marriage, though partial and reasonable restraints in relation to both subjects are valid. *Beard et al. vs. Denis*, 6 Ind. 200. A contract not to marry a particular person is good, but a contract not to marry at all is void. Chit. Cont. 671. "Marriage, no doubt may be made the subject of regulation by qualified restrictions, under certain circumstances, but under no circumstances whatever ought a general and entire restriction of it to be countenanced and sanctioned by law." *Middleton vs. Rice*, 6 Pa. L. Journ. 240. Quoted on p. 399, (top paging,) of Williams on Personal Property.

By-laws of cities in restraint of trade, are, when unreasonable, void. Ang. and Am. on Corp. p. 277. In the light of these considerations and established principles, we think the legislature had a right to prescribe the condition or regulation, as enacted, that railroads shall fence, or pay for the stock they injure. We cannot say judicially that is not a reasonable regulation, necessary to prevent their injuring others, without such others' fault.

4. The third section, so far as it inflicts a penalty, for appealing and failing to reduce the judgment 20 per cent. is, in our opinion, unconstitutional and void.

A law may be constitutional in part and unconstitutional in part. This third section relates to the practice of the law in these cases. The trial and rendition of judgment are a part of the practice in a cause. The section is special. Laws are general or special. This is the first great division. Special laws are again divided into local, personal, particular, &c. See Smith's Com. p. 419. A special act concerns "the particular interest or benefit of certain individuals, or of particular classes of men." See 1 Kent, 459. A law may be "partly public and partly private."

The principle of this act is entirely different from the principle of those general laws fixing the jurisdiction of the several courts. The jurisdiction of the court of the justice of the peace is limited by them in respect to amount. But within that limit it operates alike

upon all. So as to that of the Common Pleas and of the Supreme Court. There may, however, be unconstitutional sections in those acts. As to this we are not now called upon to speak.

The section then under consideration being special, and upon the practice of the law, is prohibited by that clause of section 22, art. 4, of the constitution, which provides that no such act shall be passed, "regulating the practice in courts of justice."

5. The first section of the act is also void, so far as it gives, as to amount, unlimited jurisdiction to justices of the peace. In that particular it is special, and in conflict with that clause of the section of the constitution just cited which prohibits special laws; "regulating the jurisdiction and duties of justices of the peace and of constables."

This point, however, does not affect the present case. The judgment is reversed, with costs, and the cause remanded for trial and judgment according to the course of the general law of the State.

In the Supreme Court of Chittenden (Vt.) County, 1855.

DAVIES & AUBIN vs. JOHN BRADLEY & CO.

Where a shipper consigns goods to a factor and endorses and sends forward bills of lading for them, and upon the faith of such bills of lading the factor makes advances. *Held*, that the facts constituted such a symbolical delivery of the goods to the factor or consignee as to amount to a constructive possession, and that the factor's lien attached.

The opinion of the court was delivered by

REDFIELD, Ch. J.—The question in the present case is in regard to the right of a factor to a lien upon goods consigned to him and upon which he has made advances. Ashurst, J. in giving the opinion of the court in *Lickbarrow vs. Mason*, 1 H. B. 357; 2 T.

R. 63; 6 East, 21, a very leading case upon this subject, says, in regard to a bill of lading, "If the consignor had intended to restrain the negotiability of it, he should have confined the delivery of the goods to the vendor only, but he has made it an endorsable instrument. The judge seems to consider the fact that the bill is made to deliver to assigns, essential to its validity, in the hands of a bona fide purchaser of the goods. 3 B. & Al. 282; 1 Ld. Raym. 271. And in Chitty upon Contracts it is said, p. 485, "if the bill of lading be to deliver to A, he should be plaintiff. The bill of lading will decide who shall sue the carrier, citing *Bryans vs. Nix*, 4 M. & W. 775. The form of expression used by Mr. Chitty, as indicating who is to bring the suit, upon the face of the contract of consignment, or receipt by the carrier, is the very identical language of two of these receipts. "June 13, 1848. Received of B. & H. Boynton, twenty-two bales of wool, *to be forwarded to Davies & Aubin.*" The one of May 30, is "*to forward Davies & Aubin,*" and that of the 15th June. is, "Received in store, &c. of B. & H. B., for Davies and Aubin," which is still more explicit, if possible. In the case of *Bryans vs. Nix*, the paper called indifferently a shipping receipt, and a bill of lading, was not made to assigns, but only to the plaintiffs, and the effective part of the contract was to be delivered to Delany & Co. at Dublin, in care for and to be shipped to the plaintiffs in the action, which is certainly no more express in its undertaking to forward the goods to plaintiffs, than the contract of defendants in the present case. In either case it is an express promise to deliver to the consignees. It can, by no kind of refinement, be made to signify anything else. And according to all the cases, if the plaintiffs had been purchasers, this would have vested the absolute title in them, subject only to the right to stop *in transitu*, which right might have been defeated, by a bona fide transfer of the bill of lading for value. In *Hall vs. Griffin*, 10 Bing. 246, it was held, that the transfer of a wharfinger's receipt was a transfer of the property. And Tindale, Ch. J. said, "it had been the practice to consider money advanced, upon a wharfinger's receipt, in the same light as if advanced on the actual delivery of goods." And the holder of a lighterman's receipt is said to have a

control over the goods till he can obtain a bill of lading. *Craven vs. Ryder*, 6 Taunton, 433.

As contended by counsel in the case of *Bryans vs. Nix*, the contract was destitute of almost all the essentials of a bill of lading. It was no voyage at all, but a mere transfer along a canal boat to Dublin, and from thence to Liverpool. But the court held that the consignees acquired a sufficient title to all the cargo which was actually put on board the boat by the consignors, before the shipping receipt was executed, and forwarded to the plaintiffs, but not to such, as was then under their control and not shipped, so that the mere promise to ship certain articles set apart, would not be sufficient, but it must actually be done, and the shipper's receipts according to most of the cases forwarded and the bill accepted, or advances made upon the faith of such shipment, before any new destination is given to the cargo. Until that is done the matter is ambulatory, and dependent upon the will of the consignor. But afterwards, it is beyond recall. In that case the consignor altered his mind before the second boat was landed and gave an order to the shipper to have its cargo delivered to another person, as also the first. And the court held, that the first was beyond his control and not the second, because the order was countermanded before it was shipped.

It seems impossible to distinguish the present case, in principle, from the case of *Bryans vs. Nix*. There are many cases where a symbolical meaning of goods with an advance, or acceptance upon the faith of the delivery of such symbol, has been held to create a lien upon the goods, the same as the actual delivery. In *Hall vs. Griffin*, 10 Bing. 246, before referred to, one Willson was the owner of goods, which were about to be shipped from Stockton to London and took a wharfinger's receipt for them, which he handed over to plaintiff upon an advance of money. The plaintiff showed this wharfinger's receipt to the wharfinger at London before the goods arrived, and he promised when they did arrive to deliver them to plaintiff. And the court held, that the plaintiff acquired such an interest in the goods, as will enable him to maintain trover. This is put by the court upon the ground, that it is a symbolical

delivery of the goods, the same says Bosanquet, J., as if the goods passed from hand to hand.

In the case of *Craven vs. Ryder*, 6 Taunton, 433, the plaintiffs contracted to sell sugars to one French, and put them on board the ship for that purpose, but took a lighterman's receipt for them as shipped "for and on account of the plaintiffs" and although the master gave a bill of lading, certifying that the goods were shipped for French, or his assigns, it was held, that he did this in his own wrong until the lighterman's receipt is surrendered. That was the contract of consignment, until exchanged for the bill of lading.

So that to give a factor a lien upon goods consigned, but not actually received, these incidents must concur. 1. The consignment must be in terms to the factor. That was so in the present case, as much as if a formal bill of lading had been made in his name, omitting assigns. So that the undertaking of Bradley & Co. is in terms, to forward them to Davies & Aubin, and for their benefit. They are upon the face of the forwarder's receipt, (which is in fact a bill of lading, as far as one can properly exist in these inland transactions,) the party entitled to sue, and the instrument binds the defendants to forward the goods to the plaintiffs, and equally binds the carrier, to deliver to them, and *prima facie* the plaintiffs are the only party entitled to receive the goods, upon the face of the transaction. B. & H. Boynton had parted with their control over them. 2. But to the conclusiveness of such a contract against creditors and subsequent purchasers, it is requisite that the consignee should have made advances or acceptances, upon the faith of these particular consignments. That, too, we think is shown by the testimony, and found by the jury.

In addition to this, which seems commonly sufficient to give the factor a lien, and is all that existed in *Holbrook vs. Wight*, 24 Wendell, 169, and which seems to us to be a sensible, and we see no reason to doubt, a sound case. In addition to all this, the present case does contain what all the cases and all the books upon this subject, as far as I can learn, have ever regarded as a symbolical delivery of the goods, the sending to plaintiffs the shipper's receipt, which is in effect and in terms, a consignment, or bill of lading to

the plaintiffs. For what is a bill of lading? It seems to be nothing more than an acknowledgment that the goods are put on board the ship, at one port, to be delivered to A. B. at another port, or to his assigns. This contract is commonly executed in triplicates, one of which is kept by the master for his own information, as to the nature of his undertaking, one is retained by the consignor, to show that he has shipped the goods, the other, which is the only one intended to be negotiated, is forwarded to the vendee or factor, and if these persons endorse such bill of lading, for value, it passes the title of the goods even to the defeating of the right to stop *in transitu*. The consignor may, if he choose, take the bill of lading in his own name, and then he can endorse it. But, unless he restricts the consignment to be delivered for his own use, the consignee is the party *prima facie* entitled to control the delivery, and the title. And this is the form of the present consignment. And the shipper's receipt, being delivered to plaintiff, and acceptances made upon its faith, the plaintiffs title was perfected to the extent of his lien, and this point is expressly put to the jury and found.

This point was considered and decided by the court when the case was last before us, and is repeated in 24 Vt., 55, and the re-argument and re-examination has confirmed our convictions of the entire soundness of the decision. We do not think the question is one susceptible of reasonable doubt, and it seems to us to have been properly submitted to the jury, so that we might here content ourselves by affirming the judgment; but we are induced to examine the cases further to some extent.

The case of *Holbrook vs. Wight*, 24 Wendell, 168, is a full authority for the decision of the county court in this case. There the plaintiffs were commission merchants in New York, and their correspondents manufacturers, at Middlebury, Vermont. They advised the plaintiffs of the goods being in readiness to be forwarded to them, and that they would be sent to a house in Troy, as soon as consistently could be, to be forwarded to plaintiffs in the spring. That was done, and the goods sent to a forwarding house in Troy, with instructions to forward them to plaintiffs upon the opening of navigation. The consignors, about this time, drew upon the plain-

tiffs for \$6,000, at different dates, which the jury found, as they did in the present case, the plaintiffs accepted, relying upon these consignments. The consignors, being pressed by other creditors, made a different disposition of the goods, while remaining in the hands of the forwarder, at Troy, and ordered them into other hands, and to be delivered to other parties. But the court held that the lien of the first consignees was perfected, and the subsequent disposition of the property could not defeat their rights. In this case there was nothing like a symbolical delivery which does exist in most of the English cases upon this point, and equally in the present case, and which seems to be regarded by most jurists and merchants, as an essential element in a consignment to a factor, in order to perfect his lien for advances made upon the faith of such consignment, and which fact is regarded as amounting, in all cases, to a substantial change both of title and possession. The case of *Taylor vs. Kymer*, 3 B. & Ad. 320, is a very elaborate and well considered case, where this distinction is fully recognized. It may be here noticed that some of the English cases treat a formal bill of lading as strictly negotiable, notwithstanding the omission of the word assigns. *Renteria vs. Reuding*, 1 M. & M. 511. But no question of that kind arises in the present case, see 1 Smith's Leading Cases, 260, note to *Miller vs. Race*, where the proposition is attempted to be maintained that no instrument, by the English common law, is strictly negotiable, unless in terms made to assigns, or order, or bearer, &c., that is, unless its negotiable quality appears, in terms, upon the face of the instrument. None of the principles laid down in the case of *The Frances*, 8 Cranch, 335 *et seq.* have much application to this subject, as the questions there discussed, have reference to prize cases, nor does any general principle there laid down, conflict at all with our decision here. *Mitchell vs. Ede*, 39 Eng. Com. L. 260, 11 Ad. & Ellis, 888, is decided chiefly upon the question of the intention to consign the particular goods, and the effect of endorsing a bill of lading, as passing the absolute title, and so far as the symbolical delivery is concerned, is an authority for our present decision. In the case of *Elliott & Boynton vs. the defendants*, 23 Vt. 217, there was no advance or acceptance upon the faith of any particular con-

signment, and nothing like a symbolical delivery, which leaves the case wholly dissimilar to the present. No shipping list or receipt was ever delivered to the plaintiffs in that case, by any one. The case of *Whitehead vs. Anderson*, 9 M. & W. 534, where it is held that to constitute a constructive possession in the consignee, the forwarder or carrier must enter into some new and specific contract to deliver to the consignee, is this very case, as we understand the shipper's undertaking. The case of *Gardner vs. Howland*, 2 Pick. 599, seems to us a full authority for the decision we here make. Here, the delivery of the invoice with an assignment, is regarded as a symbolical delivery of the ship. Without speaking in detail of the other cases, which seem to us more remote from the very points involved in this case, we conclude by saying that no case, and, so far as we can perceive, no principle conflicts with the plaintiffs' right to recover.

It is scarcely needful to advert to any criticisms which were attempted at the bar, upon the opinion of the court, in the 24th of Vt. in the same case. We have shown that the decision is sound and tenable, we think, and if it were not, it must, according to the settled practice of this court, govern the same case; but we do not consider the opinion of the court, as there reported, is fairly open to the objection, that it is extra-judicial, and mere *obiter dictum*, because the judge does not confine his argument to the single point urged by counsel. That might have been sufficient, but it was by no means so entirely free from all cavil, as the reason urged by the learned judge, which so far from being his own individual speculation, was the very ground, and the chief ground upon which the case was rested by the different members of the court at the consultation, and it is too well and too convincingly stated, to require any attempt at support or commendation from me.

Judgment affirmed.

In the Supreme Court of Chittenden (Vt.) County, December, 1856.

WILLIAM P. BRIGGS vs. S. W. TAYLOR.

1. Negligence is a mixed question of law and fact.
2. A judge is not bound to submit to a jury questions of fact which uniformly result from the course of nature; this uniformity of nature becomes a rule of law.
3. Meaning of the phrases, "ordinary care" and "gross negligence." Authorities cited and discussed.
4. Any injury to property in custody of an officer under attachment, caused by his apparent negligence or want of care, renders him prima facie liable, and imposes upon him the burden of showing a valid excuse.

The opinion of the court was delivered by

REDFIELD, Ch. J.—I. In regard to the carriage, and the wagons and sled, which were not past use, although the carriage was an old one, and the wagons and sled were described by the witnesses, as being "not very new nor very old," it seems to us there was no testimony in the case tending to show that an officer who held them under attachment, would be fully justified in letting them stand outdoors all winter. We could scarcely conceive of a State officer justifying such a course, short of absolute necessity, which it would seem would never occur when boards could be obtained. And where there is no testimony, tending to excuse an officer in such case, it becomes a mere question of damages. Questions of negligence are said in the books to be mixed questions of law and fact, but where there is no testimony tending to show negligence, or where a given course of conduct is admitted, which results in detriment, and no excuse is given, the liability follows, as matter of law, and there is nothing but a question of damages for the jury.

We do not think a judge is ever bound to submit to a jury questions of fact, resulting uniformly and inevitably, from the course of nature, as that such carriages will be injured more or less by exposure to the weather during the whole winter, or that a judge is bound to submit to a jury the propriety of such a course, when it is perfectly notorious that all prudent men conduct their own affairs differently. This uniformity of the course of nature or the conduct of business, becomes a rule of law. But while there is any uncer-

tainty, it remains matter of fact, for the consideration of a jury. It could not be claimed, that it should be submitted to a jury whether cattle should be fed or allowed to drink, or cows be milked.

II. As from the determination of the first point, a new trial becomes necessary, it will be of some importance to inquire, in regard to the proper mode of defining the duty of the officer in keeping goods, attached on mesne process. It is usually defined in practice, in this State, certainly so far as we know, much as it was in this case, by the use of the terms, "ordinary and common" care diligence, and prudence. And it is probable enough, these terms might not always mislead a jury. But it seems to us, they are somewhat calculated to do so. If the object be to express the medium of care and prudence among men, it is certain these terms do not signify a fixed quality of mediocrity even. For if so, they would not be susceptible of the degrees of comparison, as more ordinary and most ordinary, which medium, and middle, and mean, are not. The truth is, that ordinary and middling and mediocrity even, when applied to character, do import, to the mass of men, certainly, a very subordinate quality or degree. Something quite below that which we desire in an agent or servant, and which we have the right to require in a public servant, especially. A man who is said to be middling careful or ordinarily careful, is understood to be careless and is sure never to be trusted.

We have been at some pains to look into the English books upon this point, and although there may be some exceptions, the general rule certainly is, among the English judges, to express common care and ordinary care, by terms less liable to misconstruction, and as we think, likely to be more justly appreciated by juries. In *Duff vs. Budd*, 8 Brod. & Bing. 177, the rule is laid down by Dallas, Ch. J. to the jury, in these words: "Gross negligence is where the defendant or his servants had not taken the same care of the property as a *prudent man would have taken of his own*," and the judgment is affirmed by the full bench. In *Riley vs. Horne*, 5 Bing. 217, Best, Ch. J. says of a carrier, "the notice will protect him, unless the jury think that *no prudent person*, having the care of an important concern of his own, would have conducted

himself with so much inattention, or want of prudence." In *Batson vs. Donovan*, 4 Barn. & Ald. 32, the same learned judge lays down the rule thus: "They must take the same care of it that a *prudent man* does of his own property. This is the law with respect to all bailees for hire or reward." In *Wyld vs. Pickford*, 8 M. & W. 443, Parke, B. seems to claim a distinction between gross negligence and ordinary neglect, but admits ordinary neglect may be correctly defined in the above cases. But in *Hunter vs. Debbin*, 2 Queen's B. 644, Denman, Ch. J. said in regard to gross negligence, "it might have been reasonably expected that something like a definite meaning should have been given to the expression," "in none of the numerous cases referred to on the subject is any such attempt made, and it may well be doubted whether between 'gross negligence,' and negligence merely, any intelligible distinction exists." But the English cases all seem to agree in defining ordinary negligence as that which a *prudent man* does not allow in the conduct of his own affairs, and most of the later cases, where the question has arisen, both English and American, repudiate the old attempt to distinguish three distinct degrees of diligence and the cumulative degrees of negligence. In *Wilson vs. Brett*, 11 M. & W. 113, Baron Rolfe makes some very pertinent remarks upon this subject. "I said I could see no difference between *negligence* and *gross negligence*, that it was the same thing, with the addition of a vituperative epithet." And in *Austin vs. The Manchester R. R.* 11 Eng. L. & Eq. 513, Cresswell, J. refers to the language of Lord Denman quoted above, with approbation, and in the *Steamboat New World vs. King*, 16 Howard U. S. 474, Mr. Justice Curtis seems to adopt a similar view in regard to these distinctions being more or less unintelligible, and in practice often leading to misconstruction and misunderstanding. It seems too that these distinctions are repudiated by many of the continental jurists in Europe, as producing more uncertainty than they need, 6 Toullier's *Droit Civile*, 239, 11 *id.*, 203, and although it seems we have adopted these distinctions in the degrees of diligence and negligence from the Roman civil law, I do not find the commentators on that law adopting our loose manner of expressing what is required of a bailee for hire. Domat,

part 1, book 1, tit. IV, sec. VIII, art. III, thus expresses the care of such bailees : " He who undertakes to keep cattle, ought to preserve that which is entrusted with all the care that is possible to be taken by persons who are the most watchful and diligent." And this is really synonymous with the rule adopted by the English courts. Mr. Justice Story, *Bailments*, § 11, in order to mention the old definition of three grades of diligence, defines it much in the manner it was done in the present case. " Common or ordinary diligence is that degree of diligence which men in general exert in respect to their own concerns," which certainly leaves upon the mind a different impression from the definition of Domat and the English judges, and we cannot but regard it as one calculated to mislead juries ; and this very writer, in § 13, adopts the diligence of " prudent men," as the measure of common diligence, and it seems to us nothing short of this will do justice in a case like the present.

It may with some plausibility be said, that one who employs a man known to the employer to be habitually indifferent to the management of his own concerns, has no right to expect him, all at once, even for reward, to assume a wholly different character, and the jury would be likely so to decide, the question being ordinarily one of fact, when the testimony raises any doubt ; and when one employs a man of skill and talent in the management of his own affairs, he may justly expect him to exert the same skill and talent, to the same extent in the management of the business which he undertakes for others ; and in the case of a public officer who is selected for his fitness for the particular trust, every one may justly expect all the care and diligence, which men entirely competent and careful could reasonably be expected to exert in their own business of equal importance.

The absurdity of this measure of duty in a public officer will become sufficiently obvious, if we advert to the form of the oath or of the official bond of public officers ; what should we think of having one sworn or giving bond to perform his duty as common men ordinarily do such things. This certainly sounds very different from the official oath, " that you will faithfully execute the office to the

best of your judgment and ability," and an official bond obliges officers to the strictest, most faithful performance of all their duties. Any other standard would sound absurd, and it is obvious to us, that the case of *Bridges vs. Perry*, 14 Vt. 262, was not intended to introduce any different rule of liability upon officers in keeping property, as said in *Drake* on Att. § 273, "The officer must comply with all the requisitions of the law," (one of which is, to keep safely, property attached on mesne process, and restore it when required by law,) "or show some legal excuse for not doing so." Hence in *Sewall vs. Marston*, 9 Mass. 580, an officer was held bound on mesne process, five years before, ready for sale on the execution, and in *Tyler vs. Ulmer*, 12 Mass. 163, it was held, an officer could not in such case excuse himself for not producing cattle, by showing that from the scarcity of fodder they could not have been kept alive.

Any injury or loss in such cases, renders the officer *prima facie* liable, and imposes upon him the burden of showing some valid excuse. *Logan vs. Matthews*, 6 Barr, 417, Story on Bail. § 411. *Platt vs. Hubbard*, 7 Conn. 501, *Burt vs. Millar*, 13 Barbour, 482. There is undoubtedly some contradiction in the cases, in regard to the burden of proof of negligence in the ordinary care of bailments for hire, but there can be no doubt, we think, in regard to the question in the present case. This is expressly so laid down in *Bridges vs. Perry*. The court in that case, as will be obvious from a careful examination, had no purpose of excusing this class of officers from any degree of care and diligence, which careful men would expect under the circumstances.

And this, it seems to us, is the true measure of liability in all cases of bailment. The bailee is bound to that degree of diligence, which the manner and the nature of his employment makes it reasonable to expect of him; any thing less than this is culpable in him, and renders him liable. The conduct of men in general in the region where the attachment was made, may be some guide to what ought to be required of the defendant in keeping property attached. We mean, of course, prudent and careful men, for no one is expected to go very essentially beyond the common custom of the country

in such matters, as it must be attended with extraordinary expense and a question might thereby arise as to the propriety of incurring such expense.

Judgment reversed, and case remanded.

In the Supreme Court of Pennsylvania, January 1857.

SUNBURY AND ERIE RAILROAD COMPANY vs. HUMMEL.

1. The liability of Railroad Companies for damage caused by fire through the negligent management of their engines, is settled at common law. But,
2. They cannot be called upon to make compensation in advance for the risk of fires not included within the common law rule, and no such considerations can operate upon the viewers in fixing the amount of damages to be awarded to the land-owner.
3. The Legislature, in requiring the viewers to take into consideration the advantages and disadvantages resulting from any public improvement, as a railroad, did not authorize them to enter into remote and contingent future and speculative damage; full compensation according to the best estimates that can be obtained, would seem to be the true rule.

The majority opinion of the court was delivered by

LOWRIE, J.—Railroad companies are liable at common law for the damages done by fire occasioned by the negligent management of their locomotive engines; and therefore it is plain that for the risk of such damage, no compensation can be allowed at the taking of the land for the construction of the road, 23 State R. 373. Must they make compensation in advance for the risk of fires not covered by this rule. The charter of this company does not expressly say that they must; and therefore we must inquire what may reasonably be presumed to have been the intention of the legislature when they granted the charter. To aid us in this, it is proper to refer to what the legislature have usually done in such cases. In no charter that we know of have they ever in terms provided for such compensation, and the State did not allow it when it constructed the railroads from Philadelphia to Columbia, and from Hollidaysburg to Johnstown. And in making the State canals and authorizing other navigation improvements, the corresponding risk of dams

giving way, without negligence, has, in no instance, been declared to be a subject of preliminary compensation. And yet no one can examine our laws providing for public improvements, by the State or by companies, by means of canals, railroads, plankroads, turnpike roads and slackwater, without seeing that in such cases the legislature have in almost every instance intended to provide compensation for every injury that is usually recognized as such by the common law if committed by a private individual. An oversight in this regard in the charter of the Monongahela Navigation Company, was corrected by statute. Such has been our legislative practice.

How do we find the judicial practice here and elsewhere? As a general rule, not otherwise. The courts have regarded the special remedies provided in such cases, as intended to cover all common law injuries and no more, unless the contrary appears. 4 Rawle, 23; 16 State R. 193; 19 id. 15; 2 Watts, 418; 6 M. & W. 705. But this does not include remote, contingent and speculative damages which are not susceptible of definition or proximity chargeable to the work done; as by changing the use of a street by laying a railroad track upon it; (6 Whart. 45) or if the damage depend on accidental circumstances existing at the time; (id. 115) or for profits which might have been made; (7 Serg. & R. 422; 5 Ad. & E. 163) or for affecting a public right of fishing; (14 Serg. & R. 83) or such like cases; (8 State R. 56; 17 Pick. 284.)

And such is in fact the principle of the *Monongahela Navigation Company vs. Coons*, 6 Watts & S. 101, not that consequential damages are not recoverable in such cases unless expressly provided for, but that the damage sued for was not an injury at common law. It decides that if one has a mill dam on a navigable river, constructed under a general privilege granted by law, with the condition of not obstructing the navigation, he has no remedy against a company authorized to improve the navigation by dams and locks for injuring his mill-power by raising the water in the river by their dams, unless a remedy be expressly given. And a principal reason for this appears in the argument of the learned Chief Justice pp. 112-114, to show that such a privilege is revocable, and therefore the act complained of is no injury at law. Grant that there is nothing in the constitution that demands that the legislature

should provide for consequential damages, still justice requires it, and it is always done, both for State and company improvements, unless omitted by mistake; for it is not for the purpose of assuring to improvement companies any part of the State's immunity from action, but from the necessity of the case, that special tribunals and modes of trial are provided for such cases. Many cases show that the compensation clauses are entitled to a liberal construction, as remedies for damages sustained, they, under the clause, "interfering in any way with the right of property," damages were allowed against the State for injuring a mill-power in a branch stream. 2 Watts, 418. Under a clause for land damaged or injuriously affected, damages were allowed against a company for lowering a road on which the complainant's land abutted, (2 Queen's B. R. 347) and for obstruction of lights and annoyance by dust and dirt blown from an embankment, (10 Mees. & W. 425) and for affecting the access to a wharf by passing between it and low-water mark without touching it, (6 id. 699.)

And when viewers are required to take into consideration the advantage and disadvantage resulting from an improvement, they are authorized to enter in some measure upon speculative and contingent estimates, unless these advantages consist simply of the conveniences of the road to the owner of the land, and these disadvantages, the inconveniences arising from the mode in which the improvement cuts through his land; and then they could not be speculative or contingent, though the measure of them, in many instances, might be very difficult, in an English case, (*Lee vs. Milnor*, 2 Mees. & W. 824,) under a clause authorizing compensation for future temporary or perpetual continuance of recurring damages, it was held that no contingent or imaginary damages, which may never occur at all, could be allowed, and that the cause of the injury that could justify any, must exist in some work of the company from which an injury is certain to accrue, and which furnishes the elements of a calculation. In the charter of this company the compensation to be allowed is for the damage done or likely to be done, or for the damages that have been or may be sustained; taking also into account the advantages and disadvantages, and we

cannot doubt that the compensation intended is to be sufficient to cover all the damages actually sustained by the construction of the road, whether direct or consequential, and without the shield of the State's immunity from action as against any part of it.

The law, therefore, provides for the future damage likely to be done. But this is susceptible of a very obvious explanation, and that is, that the law was providing for an assessment of damages before the work should be constructed, and therefore this form of expression was necessary in providing for any damage direct or consequential; and it does not necessarily imply damage that is speculative and imaginary. And besides, it is a very proper mode of including these permanent and continuing inconveniences that are always apt to follow such improvements, arising from embankments, deep cuts, obstructions of road, &c.

Is it reasonable to infer that remote and contingent future damage, such as accidental fire from locomotives, was intended to be estimated and paid for? We think it is not; we find no act of assembly that indicates that such a thing was ever thought of. The legislature never had any thing like it in its mind when providing for public improvements. The law proclaims its general rule, that it has no remedy for mere accidental injuries; and when providing for the construction of internal improvements, it has uttered no new one. It has given no compensation for the risk of bridges burning or falling back, or toll-houses taking and communicating fire, stationary engines exploding, locomotives running off the track into a man's house, dams and locks giving way and inundating his land, or any thing of that kind. And why should it? If it take a man's land or injuriously affects his property by the improvement, it gives him full compensation according to the best estimate that it is competent to obtain; and why should we have more? True, his risks may be increased by the improvement, but so is it with every man along the road, even though his land be passed without touching it, and why should he be paid for the risk and the other not? In going along streets, the locomotives may pass under the very eaves of a thousand houses, without paying in advance for the risk. The improvement increases the risk, but so does improvement by the

erection of mansions, and especially of all sorts of steam works, but no one gets compensation for such risks. It is a simple law of nature, that he who lives in society must take the risk of those social accidents, which society knows not how to prevent. The incidental hazards must stand as balanced by the incidental benefit of the social state. It is also relevant to this question of reasonableness to ask how the risk is to be measured? There may be but a single shanty on the land of the claimant, and if we are to provide for future risks, the duty is not satisfied by merely ascertaining the risk of the shanty, for there may yet be a hundred houses there; how can it be told how many, or what kind, or value? And who can calculate the chances of accidental fire? We know not yet the kind of fire that may be used; nor the improvements to be made for preventing the emission of sparks, nor how soon there will be another element than fire and steam for locomotive power, nor whether there will be one or one hundred locomotives daily along the road.

These considerations show that an estimate of such a risk for all future time can be founded on no rational principles, and can be formed only by an average of unintelligent guesses. The present case is an illustration of their uncertainty; for the risk of this barn is estimated at half its value, when most likely it could be shown by experience, that not one erection in a thousand along a railroad is burnt in a year. If all houses near to the track of proposed railroads had to be paid for at this rate, no railroads could be made.

It is unreasonable to ask intelligent men to make a sworn estimate of a mere risk which can be founded on no present data, but only on an imaginary future state of things which may never exist, or which may come complicated with other things which may totally change their character, and we are convinced that this law does not intend such an estimate.

We have said nothing as yet of the *Railroad vs. Yeiser*, 8 State R. 366, though it is one that has occasioned much of this discussion. We desire to leave that case as little affected by the point here decided as possible, for it does not stand on the very same ground, since there the road was to be made before the damages were assessed, and yet there were to be damages for inconveniences "likely

to result." But still we may be indulged in saying, that it seems to us that the point for which that is cited did not arise here; that was an action for negligence, and the learned president of the Common Pleas held that, if the railroad company caused the accident, they must disprove negligence, and for this the judgment was reversed. Though the principle seems to be sustained by the opinion of Gibson, C. J. in another case, (4 Rawle, 25,) we cannot see how in such a case the question which we have here discussed, could be raised, and therefore it seems to us that thus far it contains an irrelevant expression of opinion by a single judge.

From what we have said, it results that this judgment must be reversed so far as relates to the one thousand dollars allowed for damages that may be done by accidental fire, and affirmed as to the residue.

NOTICES OF NEW BOOKS.

We have on our table the last two numbers of the *Revue Historique de Droit Français et Étranger*, a periodical published in Paris, and conducted by several distinguished jurists, professors of law and practitioners at the bar. Among these is Mr. Laboulaye, member of the *Académie Française*, and one of the most eminent of his countrymen in the domain of jurisprudence.

This *Review* has a large number of contributors both in France and other countries, and has earned and deserved reputation. It aims to concentrate, as much as possible, individual efforts and labors in the legal world; to place side by side writers of different parts of the world; to compare and contrast the results obtained in one country with those of another, and thus to combine to enlighten and strengthen the efforts of legal learning wherever made. The words *Revue Historique* show its tendency. Its motto might be: "*The sources of the law are its best commentary.*" Hence the very great attention paid in France, and still more in Germany, and generally now over all Europe, to the history of the law. The jurist meets but few principles in modern law that have not their roots in former laws which may have passed away. The principle still lives in the new law, adapted to new circumstances, and its study with

reference to, and even in the old law, can only cause us to know its importance and appreciate its effects. Even when the old rule has been laid aside, the knowledge of what it was is almost equally important to understand and fix the just limits of the new rule about to occupy its place.

The scope of the *Review* is not confined to the French law. Foreign law claims much of its attention, inasmuch as nothing better exhibits in their true light the laws of one country than a comparison with those of another. Hence the existence in all European legal faculties of at least one special chair for Comparative Jurisprudence—" *législations comparées*."

The articles contributed are generally well worthy of perusal, and even study. M. Villegues furnishes a valuable one, "*De l'absence en droit Romain et en droit Français*." In this he notices and ably controverts the opinion long prevalent, that the principles contained in the title, "*des Absens*," in the code Napoleon, are the work of the *rédacteurs* of that code, and that they are here the creators of a new law. He shows here that the sum total of the matter, borrowed from the law that governed France prior to the promulgation of the Code Napoleon, is far greater than that which was rejected. The Roman, the Canon, and the Customary law, (*droit coutumier*) are more extensively drawn upon. The author shows that the Romans had no complete system on *absence*, and that the principal merit of the *redacteurs* of the code has consisted in their having divided the time of absence into three different periods. 1st. Period of presumption of absence. 2d. Period of declaration of absence, with a provisional *missio in possessionem*. 3d. Period of definitive *missio in possessionem*.

The article then treats extensively of the effects of absence in relation to the rights of the absentee's wife, of the eventual rights which may occur to his profit, or its effect upon his marriage, and of the effects of absence on his children and their rights and duties.

M Pontalis contributes an excellent article on the *judiciary power of England*. He well observes that the English judicial system seems, at first sight, to be composed of a number of different jurisdictions, calculated to perpetuate the confusion of the feudal system. There are civil courts, with special attributes and limited powers; ecclesiastical courts, with partial jurisdiction over lay affairs; courts for the universities and other corporate bodies; privileged tribunals for certain persons or certain districts—different systems according to the courts that apply them. Such are the obstacles which apparently lie in the way of any regular and uniform system of justice. This aggregate—somewhat incoherent, of institutions

partly obsolete, and others tottering—is but a testimony of that respect for the past inherent in the people of England, and to which they owe much of their prosperity.

The writer of the article in question gives a short account of the origin of those courts and their jurisdiction, and shows how the life and strength of the judiciary power exists mainly in the high courts at Westminster and in the Inns.

The *Lex Bajuvaricorum* is the subject of another long, but interesting article. The old legal monuments, as a source of elucidation of modern law, had ever received much attention in Europe. Hence the article above named. The singularities of its composition, formed as it is of elements from various sources, have for a long time attracted the attention of historians, and its intimate relation with the laws of cotemporaneous nations has given rise to numerous controversies. The same was the case with the "*Lex Burgundionum*," on which the writer of this article has published a paraphrase, or a commentary. This body of laws has recently been translated, and forms a useful guide to those desirous of becoming acquainted with the old law without being acquainted with the legal language of the sixth century. The learned will also find here a most useful commentary on a law which is still, unfortunately, very obscure in many places.

The common law (*droit coutumier*) continues to occupy much attention in this *Review*, and deservedly so. The most valuable monuments of science in Europe are often scattered and lost in consequence of political commotions, and it is not without great trouble that men devoted to study succeed in bringing together the fragments surviving these revolutionary tempests.

Secondary men best represent their age: those of genius, by the elevation of their thoughts, are apt to go beyond. The crowd keeps the same even tenor of its way—now and then donning a new dress. It belongs to secondary men alone to exhibit without exaggeration the grand and the ridiculous of their age. They progress, but do so with measured steps. They do not even clearly apprehend the part they are playing. To such valuable minds we are indebted for much slow, but sure progress. Their labor remains, though their name may have been consigned to oblivion. Such a one was Jean de Basmaison, a lawyer of the sixteenth century, and such were the suggestions that induced M. Bardoux to discuss the subject in an article in this *Revue Française*.

Though there is no country in the world so much favored with *legal reviews* as Germany, a new one has lately been issued from Munich by Bluntschli and Pözl, under the title of *Kritische Ueberschau*, etc., a critical survey of German jurisprudence and legislation.

It is well-agreed at this day that jurisprudence has need equally of the aid of history and philosophy. The exercise of this double way of studying law has produced the most satisfactory results. The great question now is, how to give the works and labors of both philosophers and historians a practical direction, to elucidate and perfect that system of common law, that *jus gentium*, to which the systems of all nations are approximating.

The *Review of Munich* has an able article reviewing Kemble's work on the Saxons. The author, Conrad Maurer, gives in it an interesting *resumé* of all that we know of Anglo-Saxon civilization. He is a competent judge. He has thoroughly searched the origin of the German law in the institutions of the northern nations, and especially among the Scandinavians. His recent work on the history of Iceland exhibits a rich mine to be worked out.

PRINCIPLES OF THE LAW OF REAL PROPERTY; intended as a first book for the use of students in conveyancing. By JOSHUA WILLIAMS, Esq., of Lincoln's Inn, Barrister at Law. Second American, from the fourth English edition, with Notes and references to American decisions, by William Henry Rawle, author of a treatise on Covenants for Title. Philadelphia: T. & J. W. Johnson & Co., law booksellers and publishers, 197 Chestnut street. 1857.

We regard it as very creditable to the publishers of American reprints of English books, that they generally present them to the profession with copious annotations, referring to the American cases, by American annotators of established reputation and unquestioned ability. This little, unpretending volume contains, in a succinct shape and elementary form, careful discussions on some of the most abstruse learning the bar is called upon to consider and advise upon. The severity and forbidding aspect of the older treatises on Realty have disheartened many a student, who, had he had such a book as Williams' placed in his hands, would easily have encountered, in his subsequent studies, Coke's Littleton. The notes of Mr. Rawle have greatly enhanced the value of the original book. They

are conceived and executed in the same spirit as the book itself, and we can do the student no greater favor than to send him to these able annotations for stores of instruction.

A TREATISE ON THE LAW OF CONTRACTS, AND RIGHTS AND LIABILITIES EX CONTRACTU. By C. G. ADDISON, Esq., of the Inner Temple, Barrister at Law. Second American, from the fourth London edition, with notes and references to American decisions, by Edward Ingersoll. Philadelphia, 1857: R. H. Small. pp. 1264.

Mr. Addison's treatise on contracts is by far the most useful English book on this branch of the law. It is better arranged, more thorough, and comprehends a wider range of subjects than that of the late Mr. Chitty; and it is more adapted to the necessities of the practising lawyer than Mr. Smith's otherwise invaluable lectures. Mr. Addison treats in the first place of the principal contracts with respect to real and personal estate, viz: The contracts of sale, and mortgage, pledge, and other species of hypothecation; those of the letting and hiring of property, and with labor, services, and carriage, at land and by sea; and of the other kinds of bailment, those of insurance, agency, suretyship, marriage, partnership, incorporation, association and the like. The interpretation and construction of contracts, and the rights of action to which they give rise, and the effect of assignment, novation, substitution, bankruptcy, and death, upon those rights, are then considered. The discussion of the release, discharge, and satisfaction of contracts, and the method of compelling their performance at law and in equity, as well as of the doctrines of lien, set-off, merger, and of the limitation of actions, concludes the book. A vast body of law is thus collected in a compact and convenient form, and, we may add, stated always with clearness and accuracy.

We cannot, indeed, consider this work as belonging to the highest order of text books. It is, we must admit, little more than a skilful condensation of the multitudinous decisions and statutes in England on the subjects of which it treats; and these latter are rather aggregated together by the author, than developed through and in any natural or coherent connection. There is a lack of that scientific method, that systematic discussion of principles which the law of contracts demands, but which it unfortunately

has seldom received from English writers. Mr. Addison, it is true, has to some extent availed himself of the assistance which the continental jurists afford in the consideration of topics, most of which are emphatically *juris gentium*; but he has not always done so with perfect accuracy. At the very outset, for instance, he makes the common blunder of confounding the doctrines of the Roman and of the common law with respect to *nuda pacta*, and of supposing that the *causa*, which the one, and the "consideration," which the other, makes essential to a contract, are convertible terms. Nothing could be more erroneous. A *nude pact* in the Roman law was simply a promise or agreement, which, from the absence of established formalities which indicated deliberation, or from some artificial reasons, was not clothed with an action. The question of "consideration," as we understand the word, had little or nothing to do with it. On other points, also, we have noticed that Mr. Addison has drawn a little incautiously from the wells of Roman jurisprudence, though perhaps not in matters of very grave importance.

But while thus indicating what we conceive to be a defect in the treatise before us, we have no desire to detract from the real and solid merits which it possesses, and which are now stamped with the seal of a fourth edition. Indeed, for the practical lawyer, its "very failings lean to virtue's side." What it wants in abstract completeness is more than compensated for by its copiousness of citation, its comprehensiveness of plan, and its general accuracy. Its value is much enhanced to the profession in the United States by the learned and careful notes of Mr. Ingersoll.

AN ANALYTICAL DIGEST OF THE LAWS OF THE UNITED STATES, from the year 1789 to the year 1857, with marginal references, a digested syllabus of each title, foot notes to the judicial decisions, and a full and exhaustive index. By FREDERICK C. BRIGHTLY, Esq., author of "The Law of Costs," "Equity Jurisprudence," etc.; editor of "Purdon's Digest of the Laws of Pennsylvania," etc. Philadelphia: Kay & Brother, 1857. One vol. imperial octavo.

By the courtesy of Messrs. Kay & Brother, we have been shown some specimen pages of this work of general interest, and we think the profession will be glad to be informed that such a book is now in the hands of the printer, and will be presented to the public during the ensuing sum-

mer. The important, and by far most interesting feature of the editor's labors, consists in the foot notes. Every source of authority has been explored. The decisions of the Supreme Court, the Circuit and District Courts, the Court of Claims, the decisions of the State Courts, the opinions of the Attorneys General and heads of departments have been collected, and the references, arranged under the respective sections of which they are the interpretation. The editor, Mr. Brightly, is well known at this bar, and throughout Pennsylvania, as the careful and diligent editor of Purdon's Digest in its latest and most useful editions. The plan attempted with the federal laws seems to be much of the same character. The sheets we have seen are most fully and thoroughly annotated, and leave little to be desired. Should the entire work be completed with the same thoroughness, and in a manner equally elaborate, it will certainly supply a want in our libraries which as yet remains unfilled.

REPORTS OF CASES ARGUED AND DETERMINED IN THE COURT OF COMMON PLEAS FOR THE CITY AND COUNTY OF NEW YORK; with notes, references, and an index. By E. DELAFIELD SMITH, Counsellor at Law. Volume II. New York: Lewis & Blood, law booksellers and publishers, No. 84 Nassau street. 1856. pp. 864.

This volume is quite equal to its predecessor. It contains judgments upon points of much practical importance in a large and enterprising commercial community. The amounts involved frequently appear trifling when compared with the intrinsic difficulty of the questions themselves. The Court of Common Pleas in New York is by no means a modern tribunal; until recently its jurisdiction was limited. By the Judiciary Act of 1847, the Code of 1848, and its amendments of 1849, 1851, and 1852, and the statute of 1854—the Common Pleas exercises in that city co-ordinate jurisdiction with the Supreme Court. But in addition to this general jurisdiction, it is invested with a peculiar and exclusive jurisdiction, which gives some special interest to these reports. It is the Court of Appeals for the Marine Court and the District (Justices') Courts; and, as to all suits commenced in those courts, it is the court of final resort. Its reports, therefore, contain the most complete and authoritative information concerning the practice and powers of those courts, and by analogy, of the Courts of Justices of the Peace and County Courts throughout the

State. It has also exclusive jurisdiction of cases under the Mechanics' Lien Law (except that proceedings may be instituted in the Marine or Justices' Courts upon liens not exceeding one hundred dollars, subject to review in this court). We propose in our next number to insert some abstracts of the cases in this volume, which will give our readers a better idea of the value of the reports than any mere commendation can do.

OFFICIAL OPINIONS OF THE ATTORNEYS GENERAL OF THE UNITED STATES, advising the President and Heads of Departments in relation to their official duties, and expounding the Constitution, treaties with foreign governments, and with Indian tribes, and the public laws of the country. Edited by C. C. ANDREWS, Counsellor-at-Law. Vol. VII. Containing the opinions of Hon. Caleb Cushing, of Massachusetts, from October 9, 1854, to July 9, 1856. Washington: Robert Farnham, 1856. pp, 778.

We have read this volume with much pleasure. It contains many interesting and important opinions to both professional and lay readers. The labors of the editor are most satisfactory. His head notes lead at once to the very pith and substance of the opinions themselves, enabling the reader to see at one view the subject discussed and the matter settled. The head notes and index add to the interest and value of the volume, by rendering its contents accessible to the reader, without which they could only be known by much greater toil than most readers are willing to undergo. We propose, in the next number, to present one or two opinions of general interest; and we especially commend the attention of readers to "The Celebration of Marriages by Consuls," p. 18; "The Estate of Madame Sontag," p. 68; "The Appointment of Consuls," p. 242; "The Functions of Consuls," p. 342; "The Purchase of Public Lands by Aliens," p. 351; "Foreign Enlistments," p. 367; "General Scott's Case," p. 349; "United States' Judicial Authority in China," p. 495; "Eminent Domain of the United States," p. 571; "Copyright," p. 656; "Spurious Land Warrants," p. 657, as containing learned, able, elaborate, and thorough discussions by Mr. Attorney General Cushing, well worth the attentive study and perusal of any professional reader who wishes to be fully informed upon the particular subject matter of inquiry.

T H E

AMERICAN LAW REGISTER.

M A R C H , 1 8 5 7 .

OF THE DISQUALIFICATION OF PARTIES AS WITNESSES.

“The Law that is the perfection of reason, cannot suffer any thing that is *inconvenient*.”—COKE.

“*Truth*, which only doth judge itself, teacheth, that the inquiry of truth, which is the love making or wooing of it; the knowledge of truth, which is the presence of it; and the belief of truth, which is the enjoying of it; is the sovereign good of human nature.”—BACON.

No rule of evidence is better settled than that which excludes parties from being witnesses in their own suit. All the writers, from Baron Gilbert down to Greenleaf, agree in saying that any immediate legal interest in the event of an action renders the interested party incompetent as a witness in that action.

“When a man,”¹ says Gilbert, the first writer on evidence, who flourished about the time of Queen Anne’s reign, “who is interested in the matter in question, comes to prove it, it is rather a ground for distrust than any just cause for belief; for men are generally so short-sighted as to look at their own private benefit, which is near to them, rather than to the good of the world, which is more remote;

¹ 1 Gilb. Ev. 224.

therefore, from the nature of human passions and actions, there is more reason to distrust such a biased testimony than to believe it. It is also easy for persons who are prejudiced and prepossessed, to put false and unequal glosses upon what they give in evidence ; and therefore the law *removes them from testimony, to prevent their sliding into perjury* ; and it can be no injury to truth to remove those from the jury, whose *testimony may hurt themselves, and can never induce any rational belief.*"

The only writer who entertains any doubt as to the soundness of this doctrine, is Jeremy Bentham, in whose work on "Judicial Evidence" may be found a long and able discussion of the question, taking the position that the regulation is against nature and sound sense.

It is also a rule of the common law, that no party to a suit shall be compelled to give testimony for the opposite party.

Both these rules seem to have sprung from the civil law. The cardinal maxims of the Roman jurists upon this subject, were : "*Nullus idoneus testis in re sua intelligitur* ;" "*Omnibus in re propria dicendi testimonii facultatem jura submoverunt* ;" "*Nemo tenetur seipsum prodere.*"

It is our object to examine the grounds of these rules, and to inquire whether they are founded in justice ; and, more particularly, to investigate the propriety of the exclusion of parties as witnesses in their own suits at law.

We must not suppose, however, that those arbitrary rules have always had sway. In the earliest times, before the humanizing influences of Christianity and civilization had dawned upon the world, the settlement of litigations was a matter of comparatively small importance, and the simplest means were taken to dispose of these troublesome affairs. If one man fancied that he had sustained an injury from another, the parties, by mutual consent, went before the sovereign of the country, the governor, the judge, appointed to hear and decide such questions, or even some disinterested neighbor ; they told their respective stories, the arbitrator decided between them ; and by his decision the parties were in law and in honor bound to abide. In those days, the scales of justice were unencumbered with the infinitesimal small weights of modern rules of evidence.

But as men became more refined, and as the arts and trades increased in value and importance, and as Commerce extended her white wings over the ocean, and as the barbarities of war were softened, and as nations grew to regard each other in more friendly aspects, it would seem as if man's faith in man grew less in geometrical proportion. It would seem as if when man grew rich, he became dishonorable; as if when he became civilized, his word could no longer be trusted; as if when he received Christianity, he became more exposed to the temptations of perjury; in short, it would seem as if the human race, instead of growing in wisdom and virtue, had degenerated into iniquity, and that all the advantages and privileges which we possess over our ancestors, have only sufficed to make us their inferiors in honesty. The restraints of technical rules have been thrown up as barriers against the admission of parties on their own behalf in suits at law. The simplicity, brevity, and we may say, the equity, of legal proceedings, have been in a manner destroyed.

The individuals who were once considered the most natural and proper witnesses to prove the charge of the parties, are now rejected as the most dangerous and unreliable, and their testimony is scrupulously shut out. The only persons who knew all the facts and circumstances connected with the subject matter of a law suit, are now the only persons who are not competent witnesses in that suit.

The only conceivable objection that can be urged against a repeal of these rules, is the pretended inducement to the commission of perjury that it would afford. And yet as things now stand, a wicked or designing man can easily accomplish his purposes by the subornation of perjury. A man who will himself swear falsely, can generally find others who will do the same thing, and thus he may accomplish his end indirectly, and that without rendering himself liable to the same danger of exposure that would be attendant upon false swearing. So great has this evil become, that the same punishment is now inflicted upon the perjurer and the suborner of perjury.

Again, there are numerous cases in which the law is forced to waive these rules, from motives of necessity, or of public policy, as the writers on evidence say. There are many instances in which a man may be his own witness; as where the party against whom the oath is offered has been guilty of some fraud, or of some tortious

and unwarrantable act of intermeddling with the complainant's goods;¹ in many cases of bailment, as to prove the contents of a trunk lost during transportation by a common carrier.² A party may become a witness to prove the loss of a deed or other paper, preparatory to the offering of secondary evidence to show its contents.³ So, to procure a continuance of a suit, in order to obtain testimony.⁴ Also, to prove entries in books, under certain circumstances.⁵ So, too, his affidavits are admissible to establish the materiality of a witness; to show diligent search for a witness, and in some other instances preparatory to and attendant upon the trial of an action.⁶ The answer of a defendant in equity, so far as it is responsive to the bill, is admitted as evidence in his favor as well as against him.⁷ The oath of an inventor, made prior to the issuing of letters patent, that he was the first and true inventor, may be opposed, in a question concerning originality of the invention, to the testimony of witnesses produced to prove that the invention was not original.⁸ In an action of malicious prosecution for causing the defendant to be indicted, proof of the evidence given by the defendant on the trial of the indictment, is admissible to show probable cause.⁹ An account of sale rendered by a consignee is sometimes evidence in his favor against the consignor.¹⁰ In some States, in a defence of usury, the defendant may be sworn to prove the usurious transaction.¹¹

In actions of a criminal nature, the same exceptions are made, from the same motives. It may perhaps be contended that in these cases the complainant can have no interest. It is often true that he may have no immediate *pecuniary* interest, but where that is lacking he may have a *moral* interest, entirely paramount to any paltry consideration of gain or loss. Thus, one who has been robbed or assaulted, may, by his own oath, prove the robbery or assault.¹² In proceeding under the filiation laws, the mother of a

¹ 1 Tait on Ev. 280.

² 1 Greenl. R. 27.

³ 1 Peters, 591.

⁴ 1 Greenl. Ev. § 849.

⁵ 12 Meto. 44.

⁶ 1 Greenl. Ev. § 349.

⁷ 9 Cranch, 160.

⁸ 1 Story, 836.

⁹ 6 Mod. 216.

¹⁰ 4 Cranch, 163.

¹¹ R. S. Mass., c. 35, § 4; Maine, c. 69, § 3; Kentucky, c. 37, art. 2, § 38.

¹² 1 Bull. N. P. 187, 289.

bastard may always swear as to the paternity of her child.¹ In actions of a *qui tam* nature, the complainant may always be a competent witness on behalf of the people.² And this is an instance where the witness has a pecuniary, as well as a moral, interest; for often the establishment of his claim to receive part of the fine may depend altogether upon his own oath. In an action for rape the complainant is a competent, and generally, the only witness for the prosecution.³ And as regards this last class of cases, it seems to us that an application of Sancho Panza's rule might be generally conducive to the development of truth. That immortal personage, during his gubernatorial dignity, when a woman came before him, complaining that a rape had been committed upon her person by the prisoner, asked her if she had any money about her? On receiving an affirmative answer, he commanded the defendant to take it away. After a long and desperate struggle, the man acknowledged to the governor that he was unable to do it. "Go, woman," said the sage; "hadst thou been as careful of thy chastity as thou art of thy money, thou wouldst never have lost it!"

The maxim, "*Nemo tenetur seipsum prodere*," also, is not universally applied, as an extract from Greenleaf will show:

"In some cases at law, and generally by the course of proceedings in equity, one party may appeal to the conscience of the other, by calling him to answer interrogatories upon oath. But this act of the adversary may be regarded as an *emphatic admission*, that, in that instance, the *party is worthy of credit*, and that his *known integrity is a sufficient guaranty against the danger of falsehood*."⁴

Other instances might be cited in which the law has abated its rigor in respect to the exclusion of the parties from testifying, but we have already quoted enough to establish the fact. The law, therefore, plainly admits, that in many cases the enforcing of these rules would occasion great inconvenience, and often a total failure of justice. But if the principle is right, no exception should be allowed. It either is, or is not, right. If it is right and equitable, not even the smallest departure from it should be tolerated by courts.

¹ 1 Greenl. Ev. p. 463, note 4.

² 16 Peters, 208.

³ 3 Greenl. Ev. § 212.

⁴ 1 Greenl. Ev. § 329.

It should be strictly carried into effect, and if occasional injustice should thereby be done, still, the inconvenience should be borne, with the reflection that the smaller evils which might arise from its enforcement must in the end be less oppressive than the greater ones which would certainly be consequent upon its relaxation. Every departure from a recognized and established rule or principle of law, necessarily weakens its authority, and subjects it to the criticising of those interested in the administration of justice. Most of the received maxims of evidence are simple, just, and incontrovertible; they have withstood the assault of ages, and have been embellished and illustrated by the *dicta* of judges and the learning of sages. But the rule under present consideration seems to us unjust, inconsistent, and impracticable. It has worked much injury in past times to the rights of deserving men, and has retarded the due course of justice in a greater degree than any other canon to be found in the books.

We propose to consider briefly some advantages which would arise from its repeal.

In the first place, then, we claim that its repeal would promote the elucidation of truth in our courts. The principal ground of belief is faith in human testimony. There is of necessity more truth than falsehood in the world. If it were otherwise, we should be unable to place any reliance upon the commonest representations of everyday life. There are, it is to be feared, many who "love and make a lie;" but the number of those who would commit deliberate perjury, is probably, in comparison with that of the truthful, no greater than the number of convicts in our State prisons, compared with the great mass of sober and industrious and upright citizens. But it may be said that this is not a fair comparison; there are many rascals still at large. We answer, that there are many innocent persons in confinement. As every individual at large in the world is not pure, so every person in our penitentiaries is not vile. The probability is, that ninety-nine out of every one hundred plaintiffs and defendants would tell the truth if put upon the witness stand.

Again, how inconsistent is, sometimes, the working of the rule

which we are considering. We can conceive of a man, pure and unblemished in reputation, of sober and regular habits, of disinterested benevolence, of high moral aims, of elevated philanthropy; one whose good deeds are in every man's mouth; one whom the world honors, whom God loves, and whom even villains respect. We can also conceive of another man, sunk and steeped in vice and crime; a gambler, a libertine, a blasphemer; one whose "conscience is seared as if with a hot iron;" whose moral sense is blunted by wickedness; one who is despised by his fellows, and whose existence is an offence in the eyes of his Maker. We may suppose these two men to know precisely the same state of facts in reference to a litigation. The former, if he has the interest of two shillings in the event of the suit, cannot open his mouth in court; but the latter, because he has no pecuniary interest, is a competent witness, and his evidence goes to the jury. The former is excluded through fear of his "sliding into perjury;" but the latter, who perhaps, has not spoken the truth within the memory of men now living, is freely admitted.

A repeal of this rule would tend to the elucidation of truth; first, because the parties who, alone of all men, have a full and complete knowledge of the transactions in dispute, would be confronted and sworn, and their stories compared and weighed by twelve disinterested men. How many a cause has been lost for the want of proof of a fact which lay in the knowledge of one of the parties alone! There is no remedy in such a case. Justice is misled. According to old Baron Gilbert's doctrine, such an anomaly as an honest law suit was never known; for he says: "It is not to be presumed that a man who complains without cause, or defends without justice, should have honesty enough to confess it."¹ But in our times a more enlightened belief is inevitable.

Again, the parties would be subject to the same tests as ordinary witnesses. They would take the same oath—an awful and solemn promise before God and man. They would submit to the same cross-examination—at once the most perfect and effectual system for the unraveling of falsehood ever devised by the ingenuity of

¹ 1 Gilb. Ev. 243.

mortals. The minutest circumstance, the smallest fact would be forced upon the mind of such a witness. There could be no escape from the vigorous sifting of his testimony. If he is refractory, he will be met by a determination equal to his own. If he is equivocal, he will be pushed to the wall, and made to declare himself explicitly. Conscious that everything depends upon his own story and appearance, he will be scrupulous in his statements, not deviating from the exact truth. His voice, his eyes, his manner, will be remarked and commented on by the jury. If in spite of all these guards, he lies successfully, he must be a shrewder man than most of his fellows; for he must not only deceive the opposing counsel, but the judge on his bench and the jury in their box.

Another advantage which would flow from the reform proposed, would be discoverable in the shortening of law suits, and the simplification of questions of evidence. It is notorious that our laws are tardy in their operation. It takes one-tenth of the active business community all the time to try the law suits of the rest. This is a moderate estimate, if we consider the time occupied in our courts references, and arbitrations, by parties, witnesses, judges, juries, and counsel. At our circuits, it is seldom that more than one suit is daily disposed of, on the average. [Our judges of the Supreme Court in this State¹ long ago discovered this, and recently passed a rule requiring counsel to stand, and to refrain from taking notes while examining witnesses. This was a reform, but not *the* reform. It does not answer the object sought.] So long as parties are shut out as witnesses, so long our litigations will be tedious. An incalculable amount of extraneous and cumulative testimony is now admitted, and hours are consumed at the circuits in arguing nice, and difficult questions of evidence, which owe their rise and existence entirely to the present state of things. If the law were changed in this respect, in many cases no other testimony than that of the parties would be necessary; the labors of counsel and judges would be lightened, jurymen would not be kept away from their employments; the cause of truth would be advanced, and all parties would be better satisfied with a litigation free from the burdens of our present system, and equally answering it in every desirable respect.

¹ New York.

Lawyers would have an increase of business, for more suits would be brought; and with this triple appeal to head, heart, and *pocket*, we may hope to obtain their influence in accomplishing this most desirable of all legal reforms. Much of the stigma which is now thrown upon our profession by the mass, would be removed. We should no longer have the reputation of obstructing the course of justice to fill our own coffers, and our clients would pay our reasonable demands with a better grace. There could no longer be any semblance of reason in the saying of Cornelius Agrippa, that, "the calling of advocates is to prevent equity."

We rejoice to see that the spirit of reform is at work, and that many important movements have been made towards bringing about this desirable object. It is an innovation upon old established and honored customs, and like all other reforms, must be gradual. "Reformers, generally, have to draw upon posterity for their reward."¹ But, says Lord Bacon, "surely every medicine is an innovation, and he that will not apply new remedies, must expect new evils; for time is the greatest innovator; and if time, of course, alter things to the worse, and wisdom and counsel shall not alter them to the better, what shall be the end?"² There are many prejudices to be overcome before a way can be clear for our design.

The initiate step in this matter was taken in England, in 1844, by the passage of "Lord Denman's Act," by which all disqualifications of witnesses, by reason of any interest in the event of the suit, were removed. The same enactment was adopted in our State by the code of procedure.³ Neither of these statutes, however, goes the length of allowing a party to testify in his own behalf. In several States any party may compel his adversary to testify. In Michigan this can be done, but the applicant must first make affidavit that the desired testimony is material, and known to the adverse party, and that there is no other means of obtaining it.⁴ In New York the adverse party may be called as a witness, and may testify in his own behalf, as to the matter in regard to which he is exam-

¹ Judge Edmond's address on the Code of Procedure, 1848.

² Bacon's Essay on "Innovations."

³ New York Code § 398.

⁴ R. S. 1846, c. 102, § 100.

ined in chief; and if he testifies to any new matter, the party calling him may also testify to such new matter.¹ This is considered a great step in the right path, and is a good indication of the spirit of our legislators. The law is precisely the same in Wisconsin.² In Missouri, parties may summon each other as witnesses in justice's courts, and if the party summoned refuse to appear or testify, the other may give his oath *in litem*.³ In Massachusetts, the parties in civil actions may require of each other, upon written interrogatories, the discovery upon oath of any facts or documents material to the support or defence of the action; but neither party is bound to make any disclosure tending to criminate himself, or to discover his title to any other property not material to the issue, or to disclose the names of his own witnesses, or the intended mode of proving his case.⁴ But it was left to the State of Connecticut to complete this great reform, and to set an example to her sister States and the world. It is somewhat singular that this little commonwealth, where a century ago it was unlawful for a man to kiss his wife on Sunday, or to drive to church in a gig, should be the first to adopt this most liberal doctrine. This is now the settled law of that State, as appears from the following enactment:—"No person shall be disqualified as a witness in any suit or proceeding at law or in equity, by reason of his interest in the event of the same, as a party or otherwise, or by reason of his conviction of a crime; but such interest or conviction may be shown for the purpose of affecting his credit."⁵ By a subsequent statute this enactment was confined to civil actions. The same provision was enacted in Ohio, in 1853, with the exception, that where one party is an executor or administrator of a deceased person, and the subject of the suit concerns matter originating in the lifetime of that person, the other party cannot be sworn as a witness therein.⁶

These instances are sufficient to show that the current of opinion in this country and in England is favorable to throwing aside all the old disqualifications of interest.

¹ New York Code, § 395. ² R. S. 1849, c. 98, Sec. 57-60. ³ R. S. c. 98, § 24-25.

⁴ R. S. 1851, c. 238, § 98, 106—R. S. 1852, c. 312, § 61-69.

⁵ R. S. 1854, p. 95, § 141-142. ⁶ R. S. 1854, c. 87, tit. 10, § 310.

No reform can be nearer to the heart, or more especially commend itself to the right reason of every high-minded and intelligent lawyer. It has for its object the simplification of legal proceedings, the advancement of truth, and the good of mankind. We do not despair of seeing it adopted all over this land during our lifetime. Greater reforms, even, than this, have been effected almost instantaneously. Once, a man indicted for felony in England, was not allowed to have any counsel, but was dependent upon the mercy of his judge. Once, a criminal was hung for stealing sixpence. Once, confessions were wrung out of unwilling lips, on the rack. These abuses have been banished from our criminal codes, and now is proposed a reform equally important to the interests of suitors in civil actions. It is proposed to clear our common law of a maxim whose effect is to defeat justice, and which presupposes that there is no honesty in the human race. It is proposed to let every man, good or bad, speak freely in our courts, and to submit the task of deciding between the adverse parties, to a jury fully conversant with every fact in each case. It is one of our boasts that we have the privilege of submitting our disputes to the arbitration of a jury of our peers. Let it also be our boast that we can stand up in open court, and under the sanction of an solemn oath, tell our grievances freely, and without fear of reproach. Where juries are now in the dark, and grope blindly after truth, they will be enabled to see the truth face to face; and where justice was once dimly *guessed at*, it will be grasped with certainty, and brought palpably to view. Those who would otherwise be debarred from prosecuting their just demands, will have opportunity to present their claims for adjudication. The effect of the whole will be, instead of promoting perjury, to force men to become more honest; for where a contract is made, each will be upon his guard, knowing that at any moment his adversary may step forward, and expose any attempt at iniquity or fraud.

We hope to see the time when not only all these restrictions as to parties shall be abolished, but when every person, however infamous, may be a competent witness; when no peculiar form of reli-

gious belief should shut out any one from testifying;¹ and when all men, in the possession of their reasoning faculties, understanding the nature and believing in the sanction of an oath, shall be permitted to speak that which they do know.

Then only will our system of jurisprudence be perfect. Then only will be established the great idea, that man, formed in the image of his maker, should cherish faith in his fellow. Then only will arrive that epoch prophecied by a golden poet of a golden age:²

“Jam fides, —————
 ————— et neglecta redire Virtus
 Audet.”

And, then, only will be vindicated the majesty and splendor of that LAW, whose “seat is the bosom of God; whose voice is the harmony of the world.”³

B.

RECENT AMERICAN DECISIONS.

*District Court of the United States, Southern District of Ohio—
 October Term, 1856.*

THE UNITED STATES vs. CHARLES K. SMITH.

1. The act of Congress of the 3d of March, 1797, provides, that in a suit by the United States to recover a balance due on the books of the Treasury Department, the defendant cannot give in evidence as a set-off, a claim against the government, which has not previously been presented to, and disallowed by the proper accounting officer, without proving that it was not before in his power to produce the voucher for such claim, and that he was prevented from exhibiting it, “by absence from the United States, or some unavoidable accident.”
2. The rejection of an account or claim against the United States, by an accounting officer of the government, authorized by a special act of Congress to adjust the same on equitable principles, does not preclude the defendant, when sued, from setting up such rejected claim or account, as a set-off.

¹ It has recently been decided by Judge Manly, in North Carolina, that by the laws of that State, Universalists are not competent witnesses.

² Hor. Carm. Sec.

³ We do not entirely concur with our correspondent, but we present his well-written paper to our readers for their consideration.—*Eds. Am. Law Reg.*

3. There is no authority, either in the executive or judicial department of the government, to allow a claim against the United States, which is prohibited by law.
4. The legislation of Congress prohibits any extra compensation to an officer, for services performed, properly pertaining by law, to his office.
5. The defendant, as Secretary of Minnesota Territory, having a fixed salary as such, was not entitled to claim in addition thereto, the salary of governor, during the absence of that officer; as the act organizing the Territory made it the duty of the secretary, "in case of the death, removal, resignation, or necessary absence of the governor," to discharge the duties of that office, without any provision for an increase of compensation to the secretary.
6. The proviso in the 2d section of the act of September 30, 1850, expressly prohibits the allowance of double salaries in all cases.
7. The act organizing the Territory of Minnesota, made the Secretary the disbursing officer of the Territorial government, and he cannot claim a commission on such disbursements.
8. Where an officer, with a salary payable quarterly, is appointed for four years, "unless sooner removed by the President," and a removal is made during a current quarter, he is not entitled to his salary to the end of the quarter.
9. By the organic act of Minnesota Territory, the general government became pledged to defray "the expenses of the legislative assembly, the printing of the laws, and other incidental expenses;" and the defendant is entitled to a credit for services rendered, or expenditures made, within the fair scope and meaning of these terms, so far as they did not pertain to the office of secretary of the Territory; but the words "other incidental expenses," must be restricted to such expenses as were incidental to the legislative assembly and the printing of the laws.
10. The 2nd section of the act of 29th of August, 1842, which applies to territories then, or afterwards to be organized, provides that no act of the legislature of a Territory shall be deemed of sufficient authority for a payment by the national treasury, and requires proper vouchers and proof of the same, to be exhibited to the accounting officers of the proper department.
11. In a judicial case involving the accounts of a former secretary of a Territory, in which credits are claimed, which have been rejected by the treasury department, the fact that such credits have not been embraced in the estimate required by the organic act of the Territory to be previously made by the secretary of the treasury, does not preclude their allowance by a jury, if not objectionable on other grounds.

Mr. *D. O. Morton*, District Attorney, for the United States.

Messrs. *Corwin & Probasco*, Judge *Johnson*, and Mr. *Spooner*, for defendant.

LEAVITT, J., charged the jury as follows :

This suit is brought on the official bond of the defendant, as late secretary of the Territory of Minnesota, dated the 31st of March, 1849. A balance of \$4,078 41 is claimed as due to the United States; and treasury statements are in evidence, showing such balance against the defendant. The defendant exhibits claims against the government, exceeding the amount of such balance, and insists on a judgment in his favor, for the sum alleged to be due him.

The larger portions of the items of claim exhibited in the defendant's account, have been passed upon and disallowed by the treasury department, under the provisions of a special act of Congress, authorizing their adjustment on equitable principles. The defendant also claims an allowance of about one thousand dollars, embracing items of charge against the United States, which have not been presented for payment or allowance at the treasury department, and consequently, have not been rejected by it. This latter class of vouchers was permitted to go in evidence to the jury, upon a suggestion that the defendant would be able to show reasons for their non-presentation, which would render them admissible, and with the understanding, that otherwise they were to be withdrawn from the consideration of the jury.

The 4th section of the act of Congress of the 3d of March, 1797, 1st vol. L. U. S. p. 515, provides "that in suits between the United States and individuals, no claim for a credit shall be admitted upon trial, but such as shall appear to have been presented to the accounting officers of the treasury for their examination, and by them disallowed, in whole or in part, unless it should be proved to the satisfaction of the court, that the defendant is, at the time of the trial, in possession of vouchers, not before in his power to procure, and that he was prevented from exhibiting a claim for such credit at the treasury, by absence from the United States, or some unavoidable accident." No proof has been exhibited by the defendant, which brings the items referred to within either of the exceptions stated in the foregoing provision of the act of Congress, and they must therefore be entirely excluded from the consideration

of the jury. The law is imperative on this subject, and vests no discretion in the court. There may be cases in which its operation may savour of harshness, or even of injustice, but there can be no doubt that such a provision is necessary to prevent the presentation of fraudulent or fictitious claims upon the government.

The other items of charge in the defendant's account having been presented to, and disallowed by, the proper accounting officer, under an act of Congress authorizing their settlement upon principles of equity, are properly in controversy in this suit. Such rejection of these items, by the treasury department, is not decisive of the rights of the claimant. The Constitution of the United States vests all the judicial power of the government in the courts of the Union; and it is the unquestionable right of the citizen, in a suit brought by the United States for the recovery of a balance claimed, if his credits have been disallowed by the accounting officer, to present them for the decision of a court and jury.

There is an obvious necessity that the government should hold its subordinate agents to great strictness, and the most rigid accountability in all transactions involving official liability; and in discharging this duty, the highest executive officers must be guided by law, and are not at liberty to adopt their own views of right and justice as the basis of their action. Even in cases of reference to them by act of Congress, with a power to adjust and settle accounts on principles of equity, no authority is thereby implied to allow a claim against the government which is expressly, or by clear implication, prohibited by law. And the same principle of action applies to and must govern the Court of the United States in adjudicating between the government and a citizen, as to matters of account. If the allowance of a claim is forbidden by law, a court and jury cannot give it legal validity; but if not thus prohibited, and it is in its character just and equitable, though it may have been rejected by the proper officer, it may be allowed in a judicial tribunal, if properly authenticated by evidence. When the government comes before such a tribunal as a litigant party, its position is that of equality with the citizen; and it is entitled to no special immunities, unless expressly conferred by law. If it shall happen, that

even the application of these liberal principles in such a controversy, shall fail to secure to the individual citizen the full measure of justice, his only remedy is an application to the legislative department of the government; the powers of which are ample to administer aright on the most comprehensive principles of equity, with no limitations, except those imposed by the constitution.

The items of the account exhibited by the defendant, and on which the jury are to pass, are numerous, and include claims for various services and expenditures, as secretary of the Territory of Minnesota, embracing a period between the 31st of March, 1849—the date of his appointment to office—and the 14th of November, 1851, when he was superseded by the appointment of another person. I will not detain the jury by a special reference to all the credits claimed by the defendant in his account now exhibited, but having noticed a few of them, in respect to which the construction of the court has been called for, will state some general principles of law applicable to the whole account, which may afford a satisfactory guide to the jury, in their considerations as to its proper adjustment.

I may remark here, that it is insisted by the counsel for the government, that all the items of charge in the defendant's account are liable to the objection, either, that they involve claims for services rendered by him as secretary of the Territory, legally pertaining to the office, and for which he is entitled to no compensation beyond the salary given him by law—or, if not included in this class, the services rendered and expenditures made, were in virtue of laws or resolutions passed by the territorial legislature, for which there is no legal claim on the treasury of the United States.

It may now be regarded as a principle, which admits of no question, that no officer of the United States, having a fixed salary, is entitled to any extra compensation for the performance of services or duties, which pertain to his office by law. It is wholly unnecessary to refer to the legislation of Congress, or the decisions of the Courts of the Union on this subject. The incumbent of an office is bound to perform all the duties belonging to it, without extra com-

pensation. No man is under any necessity to accept an office, but having accepted it, the obligation rests upon him to discharge its duties for the remuneration which the law provides. He accepts it with a knowledge of the pay or salary attached to it, and, though its duties may be onerous, and the compensation inadequate, if he chooses to retain the office, he must be content with what the law gives.

Some of the charges in the defendant's account are clearly within the objections just stated, and cannot, therefore, be allowed by the jury. I will notice very briefly, some of the principal items which, in the judgment of the court, must be rejected on this ground.

The charge of \$1,004 for salary as acting governor of the Territory, during the absence of the governor, is clearly within the prohibition adverted to. There are two distinct periods of service charged by the defendant, for which he claims the salary of the governor, in addition to that of Secretary of the Territory. The first is, from the 8th of November, 1849, to the 12th of February, 1850, amounting to \$645—the second, from the 10th of April, 1851, to the 2d of June following, amounting to \$358 83. The charge for the latter period is within the operation of the proviso of the 2d section of the act of September 30, 1850, and its allowance is expressly forbidden by it. This proviso is in these words—"That hereafter the proper accounting officers of the treasury, or other pay officers of the United States, shall in no case allow any pay to one individual, for the salaries of two different officers, on account of having performed the duties thereof, at the same time."

But, without reference to this act of Congress, the whole of this charge is liable to the objections, that the service was one which he was bound to perform, as Secretary of the Territory, and for which no extra compensation can be allowed. The third section of the act for the organization of Minnesota territory, authorizes and requires the secretary to discharge the duties of the executive, "in case of the death, removal, resignation, or necessary absence of the governor from the Territory." The defendant took the office of secretary, knowing, that in any of the contingencies specified, the duties of governor would devolve on him. And the law made no

provision for any additional compensation, in that event. In assuming the office of Secretary of the Territory, the defendant became bound to act as governor, if necessary under the law, as fully as he was obliged to discharge any other duty, as secretary. It pertained to the office of secretary, though not strictly within the legitimate range of its duties. The salary certainly was less than the labour and responsibility required, but this is an evil which this court and jury cannot remedy, without usurping legislative powers.

There is another item, \$557, charged in the defendant's account as a commission of one per cent. on funds disbursed by him, as secretary. This is liable to the objection stated to the foregoing item. By the eleventh section of the organic act of the territory, the secretary is expressly made the disbursing officer of the territory, and is required to account to the Secretary of the Treasury of the United States for the manner in which the funds have been expended. This was, therefore, one of the duties required of him by law, as secretary, for which he is not entitled to any extra allowance.

I will here notice briefly another charge, in the defendant's account, that must be rejected. I refer to his claim for salary as secretary, for the whole of the quarter ending the 31st of December, 1851. It seems he entered on his duties as secretary, in March, 1849, was removed by the President the latter part of October, 1851, but continued in the actual performance of his duties till the 14th of November, in the last named year. The defendant has been allowed his salary by the treasury department, to the date of his removal, but it has been rejected for the balance of the quarter. No doubt can exist to his right to it to the 14th of November, when he was in fact superseded by his successor. It is insisted, however, that he is entitled to pay for the whole quarter. The argument is, that where an officer whose salary is payable quarterly, is removed by the act of the President before the expiration of a current quarter, he is entitled to his pay to the end of it. This is believed to be in opposition to the uniform practice of the government in such cases. I do not propose to discuss the constitutional question of the power of the President to remove from office, at his own will, without presenting to the Senate the grounds of the removal, and

obtaining its approval of the act. The defendant, conformably to the act organizing Minnesota Territory, was appointed to the office of secretary for four years, "unless sooner removed by the President of the United States." For many years past, this has been the usual mode of commissioning executive and ministerial officers; and, the power of removal, with or without cause, has been freely exercised by those who have held the presidential office, for the last thirty years. True, there were those at an early period of our national government, who contended that the spirit, if not the letter of the constitution, required the President to submit the causes of removal from office to the Senate; and that, as it was only by and with the advice and consent of that body, that an appointment could be made, the same formality was required in removing from office. Although there may be some, at this day, who maintain this view, the current of opinion seems to set strongly in the opposite direction. The practice of the government has been so long settled, and is so generally acquiesced in, that there is little probability of a change. And if conceded that the power of removal, without restriction or limitation, belongs to the President, the official duties of the incumbent, and with it, his right to salary or compensation, cease when the successor assumes the office. The defendant's claim for salary from the 14th of November to the 31st of December, will, therefore, be rejected by the jury.

Before passing to the consideration of the other part of the defendant's account, I will notice an item of \$116, charged as the expenses of a visit to Washington, to procure the funds appropriated by Congress for the support of the territorial government, for the year 1850. From some cause, great delay had occurred in remitting the funds appropriated, to the seat of government of the territory. To hasten this remittance, the defendant made the journey to Washington. Its necessity is not very obvious, so far as there is any evidence on the subject. But, if the jury believe the public interests of the territory required the journey, there is no reason why the defendant should not be reimbursed to the amount of his actual expenses.

It would detain the jury unreasonably, and, as I think, unneces-

sarily, to notice in detail all the remaining items of charge in the defendant's account. In their retirement they will have the opportunity of giving to the account, and the vouchers which sustain it, a critical inspection. So far as any of these may be for services or duties performed, belonging to the office of the defendant, as Secretary of the Territory, they will be disallowed, on the grounds already fully stated. There are others, however, which stand on another basis, and which present a different question for the consideration of the court and jury. Their allowance or disallowance will depend mainly on the provisions of the act of Congress for the organization of the Territory of Minnesota. To such of them as bear upon the items in controversy, I will now briefly ask the attention of the jury.

This organic act was approved and took effect the 3d of March, 1849. The fourth section vests the legislative power of the territory in the governor and a legislative assembly. The sixth section provides, that the legislative power shall extend to all rightful subjects of legislation, consistent with the constitution of the United States, and the provisions of said act; and requires that all the acts of the governor and legislative Council shall be submitted to the Congress of the United States; and if disapproved, shall be null and void. By the twelfth section, the laws in force in the Territory of Wisconsin, at the date of her admission into the Union, are declared to be in force in Minnesota, so far as they were compatible with the act organizing the last named territory, subject to amendments and repeal by the legislature. By the same section, the laws of the United States were extended over, and declared to be in force, in Minnesota, so far as they were applicable. Among the provisions of the eleventh section is one declaring that there shall be an annual appropriation by Congress of one thousand dollars, to be expended by the governor to defray the contingent expenses of the Territory; and also, annually, a sufficient sum "to defray the expenses of the legislative assembly, the printing of the laws, and other incidental expenses." This appropriation is to be made upon the estimate of the secretary of the treasury, and to be expended by the Secretary of the Territory. The seventeenth section

appropriates five thousand dollars for the purchase of a library for the benefit of the territory.

These are all the provisions of the organic act, which it is material to notice. The act, as is obvious, is based on the admitted doctrine that a territory is in some sense, a ward of the general government, and that while in its state of pupilage, the primary and paramount power of legislation over it, is vested in congress. The act of Congress, however, granted to the people of Minnesota territory the right to elect a local legislature, in which was vested the ordinary powers of legislation, subject to the restrictions and limitations specified. Among the powers thus conferred on the legislative body, was the power of taxation for legitimate territorial purposes. But, the obligation was assumed by the general government to provide for the payment of the salaries and compensation of all the officers, whose appointments were authorized by the act. It was also pledged to defray the contingent expenses of the territory, to an amount not exceeding one thousand dollars, and also, "the expenses of the legislative assembly, the printing of the laws, and other incidental expenses."

One of the important questions presented in this case is, whether the charges contained in the defendant's account which have not before been brought specially to the notice of the jury, and upon which the views of the court have been stated, are fairly within the scope and range of the words just quoted from the organic act. The jury will observe from an inspection of the vouchers for that part of the account referred to, that they embrace charges for services rendered, and expenditures made, by the defendant, alleged to be necessarily connected with, or incidental to, the administration of the territorial government. Without referring specifically to these items, I may remark here, that so far as these claims are for services outside of the defendant's official duties as secretary, and may come within the designation of "expenses of the legislative assembly, the printing of the laws, or other incidental expenses," I see no objection to their allowance, if sustained by proof to the satisfaction of the jury. The act of Congress sanctions the payment of expenses, which may be classified under these heads, from the national

treasury; and within the limitations already indicated, they would seem to be proper items of charge against the United States. But, it is clear, Congress did not intend to impose an obligation on the general government, to meet every expenditure which might be authorized by the territorial legislature. That body was vested with a discretionary power of legislation, in regard to the local or internal interests of the territory; but any expenditure authorized for such purposes, was to be paid out of the territorial treasury. And it is obvious, that an unlimited power in the legislature of a territory to authorize expenditures, which were to be paid by the general government, would lead to great abuses, and impose a grievous burden on the national treasury. There is not only no such power in the territorial governments, but Congress has expressly provided, that in reference to the appropriation of money for expenditures in a territory, to be paid by the general government, the acts of a territorial legislature are not conclusive. By the second section of the act of the 29th of August, 1842 (5 vol. L. U. S. p. 541) it is expressly required, as to all territories, then or afterwards to be organized, that the accounts for such expenditures shall be settled and adjusted at the treasury department; and it is provided, "that no act, resolution, or order of the legislature of any territory, directing the expenditure of the sum, shall be deemed a sufficient authority for such disbursement, but sufficient vouchers and proof for the same shall be required by said accounting officers."

It will be the duty of the jury, in reference to the class of charges now referred to, to determine from an examination of the vouchers, and other evidence adduced by the defendant, whether they are fairly comprehended under the heads of "expenses of the legislative assembly, the printing of the laws, and other incidental expenses." It is difficult, if not impossible, to define with certainty what may be rightfully included in these terms. I should not probably render the jury any essential aid, if I were to attempt to prescribe a rule for their action, in this regard. I may remark generally, that it is evidently within the spirit of the language used in the act of Congress, that the expenses incurred under any of the heads stated

should be necessary and proper, and the sums reasonable. This would necessarily lead to the rejection of any vouchers for expenditures for purposes not required in the proper discharge of the duties of the legislature of the territory, and not in promotion of the public interests. So, in relation to the printing of the laws passed by the legislature. The expenses incurred must have reference, and be limited to, the object stated. The words, "other incidental expenses," are of comprehensive import, and were, without doubt, adopted by Congress, to provide for any necessary expenses which could not be foreseen, and specifically pointed out. The fair construction of these words, in the connection in which they are used, would seem not to justify the conclusion, that they were intended to include all expenditures which might be deemed incidental to the administration of the government of the territory. They must be limited in their import to the necessary incidental expenses of the legislative assembly and the printing the laws. Within the limits thus indicated, if the evidence of the expenditures and services is satisfactory to the jury, and the charges are not within any of the prohibitions previously stated, they would seem to have the sanction of law, and may properly be allowed as credits to the defendant.

It is proper that I should here briefly notice an objection urged to the defendant's account, by the counsel for the United States, founded on the position, that they have not been included in any estimate made by the secretary of the treasury, and cannot, therefore, be viewed as legal set-offs to the claim presented by the government. It is true, the act organizing the territory of Minnesota requires the secretary of the treasury to make an estimate, in advance of the appropriation by Congress, of the expenses of the territorial government. Without discussing this subject, it may be sufficient to state, that the duty enjoined on the secretary of the treasury is directory to, and obligatory on him. But, if he omits to make an estimate, or if that estimate proves insufficient to meet the first expenditures contemplated by the act of Congress, it affords no reason why the claims of an individual, coming fairly within the scope and intention of the act, should not be allowed. The question

now presented arises in a judicial case, and the true inquiry is not whether there has been a previous estimate, embracing the charges claimed, but whether they are just, and not within any express prohibition of law.

I may also refer to the letters from the comptroller of the treasury, addressed to the defendant, while he held the office of secretary of the territory, which are in evidence. These, it is insisted, authorize a part of the expenditures charged in the defendant's account. I shall not notice, in detail, the contents of these letters. It will be proper for the jury to refer to them, in their retirement, as a part of the evidence in this case. Whatever may be their purport, it cannot be claimed for them, that they invalidate the positive provisions of law. So far, however, as they may be viewed as authorizing any of the charges or expenditures of the defendant, they may properly be considered by the jury; and as to items concerning which they might otherwise be in doubt, may exercise an influence in their decision.

With these views, the case is committed to the jury. They will apply the law, as I have attempted to state it, to the evidence before them, and decide what portion of the credits claimed by the defendant shall be allowed, and what shall be rejected.

(The jury returned a verdict for the United States for \$1,536.)

In the District Court of the United States for the Maryland District.

THE PHILADELPHIA AND HAVRE DE GRACE STEAM TOW-BOAT COMPANY
vs. THE PHILADELPHIA, WILMINGTON AND BALTIMORE RAILROAD
COMPANY.

1. The Admiralty has jurisdiction over marine torts, which may be defined to be unlawful acts, injurious to others, independent of contract, happening or being committed upon the sea or tide-water.
2. A steam-tug, regularly licensed under the Acts of Congress, plying between ports in different States, is within the provision of the constitution as to the regulation of commerce, and the observance of the special State laws regulating Sunday labor, is not compulsory upon such steam-tug; but it would have been otherwise had the tug been engaged in towing vessels between ports of the same State.

8. Where the respondents had contracted with certain parties for the building of a bridge across the Susquehanna river, and the bridge contractors, at the request and for the convenience of the respondents' engineers, had driven in the bed of the river a "sight-pile," upon which a steam tug-boat run, without fault on her part, and was thereby much damaged, *held*, that the negligence of the contractors and engineers, in not removing the "sight-pile," was the negligence of the respondents, the relation of master and servant being established by the facts.

Messrs. Dobbin and Talbott, for libellants.

Messrs. Schley, Donaldson and Evans, for respondents.

The opinion of the court was delivered by

GILES, J.—This cause has occupied the attention of the court for several days, and has been fully and ably argued by the several counsel engaged in it; and since the adjournment of the court yesterday, I have examined the various authorities to which I had been referred, and the several cases cited by the counsel; and I will now announce the conclusion to which I have arrived. This is a libel filed by the libellants, (a company incorporated by the State of Pennsylvania, and who are engaged in towing canal boats from the end of the Tide Water Canal, at Havre de Grace, to Philadelphia, through the Chesapeake and Delaware Canal,) to recover damages for an injury which the steam tow-boat "Superior" (one of the boats of their line) received from a pile placed in the Susquehanna river by the respondents, or their agents. The evidence showed, that on Sunday morning, the 11th of May, 1856, the said tow-boat left her wharf at Havre de Grace, with thirty-one canal boats in tow, for the Chesapeake and Delaware Canal; that she had just got into the stream, and had shaped her course down towards the bay, when she suddenly received a shock, by striking against something in the water, and was found immediately to leak so rapidly that the bilge-pumps could not free her; and that, to prevent her sinking in deep water, the captain immediately cast loose from the canal boats, and run the steamer to the wharf at Havre de Grace, where he had wintered his boat the previous winter, and where she sank in five minutes. That he attached her to the wharf with two ropes and four hawsers, new, and of the strongest kind, but that in the course of an hour and a half, she snapped these fastenings and slid out into deep water, where she lay until she was raised, some twenty days after. That she was raised at a

cost of \$1,567, and sold, unrepaired, at Havre de Grace, for \$1,714. A survey was held on her after she was raised, by experienced men, who estimated the costs of repairing her at \$2,830, and who recommended that she should be brought to Baltimore to be repaired, as there was no marine-railway at Havre de Grace. That her injury was caused by her running against a pile stuck down in the bed of the Susquehanna river, in the place where vessels usually pass, in twenty feet water, and that the top of the said pile was about five feet below the surface of the water; and there was no buoy or other visible object to indicate its presence. That it was one of the eight piles used by the engineers of the respondents, when laying out the foundations of the bridge they intended to build across the Susquehanna river; that it had been put down by the contractors for the building of the said bridge, but they did so at the request of the engineer of the respondents, and for their convenience; and the said pile, with the other eight piles, were furnished by the respondents; that the placing or removing of these eight piles formed no part of the contract of the said contractors, and that the piles to which that contract had reference, had been sawed off, or removed previous to this accident.

There were some other facts given in evidence, but they were not important, and it is not necessary to recite them here, as those I have presented raise all the questions upon which the case was argued, and are sufficient for the purposes of this opinion.

Four defences have been taken by the respondents to the recovery of the claim of the libellants in this case; three deny any right of recovery at all, and the fourth and last one denies the right of libellants to recover the whole amount of the claim (some \$11,000) set forth in their libel.

The first defence taken is, that this court has no jurisdiction of this case, and that if respondents are liable at all, it is only in a court of common law, in an action of trespass on the case.

The learned counsel for the respondents contended that the remedy, if a suit had been brought in a court of common law, would be an action on the case, and not trespass; in such a case this court would have no jurisdiction.

That the torts of which courts of admiralty have jurisdiction, are those where the agency of man is immediate and direct in their commission, and does not embrace cases where the injury is only consequential. Now, it is laid down in all the elementary writers on admiralty jurisdiction in this country, that in all cases of contract, the jurisdiction of the admiralty court depends upon the subject matter of the contract, and in all cases of torts, the jurisdiction depends upon the locality. And that over marine torts, the admiralty courts have jurisdiction. I need only refer, for this position, to Conkling's Admiralty, page 21, Benedict's Admiralty, sec. 308, and to the case of *Waring and others vs. Clarke*, which also decided that not only torts "super altum mare" (as in England,) but those upon tide-water, "infra corpus comitatus," belong to the jurisdiction of the admiralty courts.

Now, what are torts? For a true and concise definition, I refer to the second volume of Bouvier's Institutes, one of the best elementary books we have. On page 491 of that volume, in treating of wrongs, the writer makes this explanation:

"Tort, a term of signification somewhat similar to wrong, is an unlawful act, injurious to another, independent of contract. Torts may be committed with force, as a trespass, which may be an injury to the person, such as assault, battery and imprisonment; or they may be committed without force; torts of this latter kind are to the absolute or relative rights of persons, or to personal property in possession or reversion, or to real property corporeal, or incorporeal in possession or reversion; these injuries may be either by non-feazance, malfeasance or misfeasance."

A marine tort, then, is an unlawful act, injurious to another, independent of contract, happening or being committed upon the sea or upon tide-water. Such was, no doubt, the view taken by Judge Grier, in the case of *Vantine vs. The Lake*, reported in 2 Wallace, jr. 52. That was the case of a vessel (The Lake) entering a dock in which a smaller vessel was at that time lying, and which dock contained a rise in the bed of the stream, in which but little water was left at low tide, so that when the tide went out, a vessel lying there would careen over on its side; and that this was

known to the consignees of the vessel, who had directed her to be placed in the dock; when the tide went out, the Lake fell over on the smaller vessel and injured it, and for which damages thus caused, the libel was filed. Judge Grier held the Lake responsible, and decreed accordingly. A similar case would be, where a vessel was anchored in the stream, near a port much frequented by vessels, and showed no light or signal at night; and another vessel, in the darkness of night, passing in or out of said port, without any want of care, should run against the anchored vessel, and be thereby injured. The vessel at anchor, and her owners, would certainly be responsible. I have no doubt, therefore, that this court has jurisdiction of the case.

The next defence is, that as this steamer was towing on Sabbath, and the injury was received on that day, there can be no recovery in this case, because said steamer was acting in violation of the law of Maryland, passed in 1723, which, in its 10th section, provided: "That no person whatsoever shall work, or do any bodily labor on the Sabbath day, commonly called Sunday, works of necessity and charity always excepted." The evidence showed, that the "Superior" was regularly licensed for the coasting trade. There was some evidence that there had been a breach in the tide-water canal, which caused the canal-boats to accumulate at Havre de Grace, and that the Superior was under the necessity of making this trip on Sunday, to relieve this pressure. But in the view of this Court, that is not such a work of necessity as would bring the case within the exception of the act of 1723.

The libellants had the monopoly of this towing business between Havre de Grace and Philadelphia, and were bound to look to all the contingencies of the service, and provide boats sufficient for it. The question then remains, was the "Superior" amenable to this act, and bound to obey its provisions? To solve this question truly, we must first see what her license authorized her to do, and what force and effect that license had, when coming in conflict with a law of this State. It is perfectly clear, that if this boat had been engaged in the domestic commerce of this State, towing barges or boats from the Eastern Shore to Baltimore, or from Havre de

Grace to Baltimore, the provisions of this law would have been obligatory upon her. But by the 8th section of article 1st of the Constitution of the United States, the power "to regulate commerce with Foreign nations, and among the several States and with the Indian Tribes," is given to Congress. This power is an exclusive power; and no act of a State, which in any way would seek to regulate, restrain or limit foreign commerce, or the commerce between the States, can be of any binding effect, except it be adopted by, or otherwise receives the sanction of Congress. This principle was decided in the case of *Gibbons vs. Ogden*, reported in 9 Wheat., page 1. That case also decided, that the power given to Congress to regulate commerce, extends to vessels propelled by steam, as well as those navigated by the instrumentality of wind and sails; and also, that a license under the Acts of Congress for regulating the coasting trade, gives a permission to carry on that trade. The opinion in that case was delivered by Chief Justice Marshall. This was in 1824. But, recently, this question has been again brought before the Supreme Court, and was there very fully argued, and received the careful examination of that learned tribunal. I allude to the Passenger Cases decided in 1849, and reported in 7 Howard's Supreme Court Reports. The cases commence on page 283 of that report, and embrace two hundred and ninety pages, nearly one-third of the volume.

The Judges gave their opinions seriatim, but Justices McLean, Catron, McKinley, Wayne and Grier, united in the opinion, that the laws of Massachusetts and New York, brought up to review in those cases, were void, as they were regulations of foreign commerce, and therefore beyond the constitutional powers of the States. I can only here make two short extracts from these able opinions. On page 400, Judge McLean announces the conclusion to which he arrived, in the following language:

"Whether I consider the nature and object of the commercial power, the class of powers with which it is placed, the decision of the court in the case *Gibbons vs. Ogden*, reiterated in *Brown vs. The State of Maryland*, and afterwards re-asserted by Mr. Justice Story, who participated in those decisions, I am brought to the

conclusion, that the power 'to regulate commerce with foreign nations, and among the several States,' by the constitution, is exclusively vested in Congress." And on page 414, Judge Wayne, in announcing the conclusion to which he and a majority of the court had arrived upon this most important question, says: "That the power in Congress to regulate commerce with foreign nations, and among the several States, includes navigation upon the high seas, and in the bays, harbors, lakes and navigable waters within the United States, and that any law by a State, in any way affecting the right of navigation, or subjecting the exercise of the right to a condition, is contrary to the aforesaid grant."

Now, it must be admitted, that if this law of Maryland, for the observance of the Sabbath, can be made applicable to vessels engaged in the commerce between the States, then they are made subject to a regulation which Congress never authorized or sanctioned. Under her license, what were the rules and regulations by which this vessel was bound, and under which she was authorized to sail? These regulations will be found in the Act of September 1st, 1789, section 22, and in the 2d and 3d sections of the Act of March 2d, 1819. But there is no provision in these, or in any other Acts of Congress, that she should not sail on Sunday. I consider, therefore, that the steamer of the libellants was not bound to obey the law of Maryland, to which reference has been made, and that there is no valid objection to the recovery of the libellants for the damages they have suffered on that ground.

Reference has been made, in the course of the argument, to the quarantine and pilot laws of the several States, which we recognized as valid and binding upon the commerce of the country. But an examination of the Acts of Congress, will show that they have been sanctioned and adopted by Congress. By the 4th section of the Act of August 7, 1789, it is enacted: "That all pilots in the bays, &c., of the United States, shall continue to be regulated in conformity with the existing laws of the States, respectively, in which such pilots may be, &c., &c., until further legislation shall be made by Congress." And by the Act of the 28th February, 1799,

the quarantine and health laws of the several States were sanctioned and approved.

The next objection taken to the recovery of this claim by libellants is, that the contractors for building the bridge are the responsible parties, and not the respondents. And in the argument of this point, I was referred to some twelve English decisions, and three American cases. I have examined these cases, and according to the view I take of the facts of this case, I do not deem them applicable. The law they lay down is not disputed by the libellant's counsel, nor could it be controverted in a case where similar questions might arise. In nearly all of them the question was, whether the party committing the tort was the servant of the defendants, or whether he was not the servant or agent of another party, acting under an independent contract. Of this character are the cases of *Rapson vs. Cubitt*, Reported in 9 Meeson and Welsby, 709; *Reedie vs. London and North-Western Railway Company*, reported in 4 Exchequer Reports, 244; *Knight vs. Fox*, 5 Exchequer Reports, 721; *Quarman vs. Burnett and another*, 6 Mees. and Welsby, 499; and the late case of *Steele vs. The South-Eastern Railway Company*, reported in 32d English Law and Equity Reports, 366. In all these cases, except *Quarman vs. Burnett*, the work from which the injury resulted had been performed by the employee of one who had a contract for the execution of said work. *Quarman vs. Burnett*, was the case of an owner of a carriage hiring horses of a job-man, who provided a driver; and the owner of the carriage was held not responsible for an injury caused by the carelessness of the driver.

The case of *Milligan vs. Wedge*, 12 Ad. & Ell. 737, (40 E. C. L. Rep. 177,) was the case of a butcher who had employed a licensed drover to drive him a bullock he had bought at market, and the drover's boy, by his negligence, suffered the bullock to run into the plaintiff's show-room, where he did considerable damage. It was held that the owner of the bullock was not responsible.

The three American cases to which I have been referred are *Blake vs. Ferris*, in 1 Selden, 48; *The Mayor &c. of New York vs. Bailey*, 2 Denio, 434, and *Lowell vs. The Boston and Lowell Rail-*

road Company, 23 Pickering, 21. These cases maintain the same principle upon which the English cases were decided. And in the cases in Denio and Pickering, the defendants were held responsible, on the ground that a party is responsible for an injury resulting from the negligence and unskillfulness of his servants or agents.¹

Now, the evidence in this case, in my opinion, clearly shows that the steamer was injured by running upon a *sight-pile*, which had been placed in the river by the direction and for the use and convenience of the engineers of the respondents, and was not placed there by the contractor, in the execution of his contract for building the bridge. It was clearly, therefore, the negligence of the engineers in not removing this pile, when they had ceased to use it; and for the injury resulting from this negligence of their agents, I think the respondents are answerable. The only question remaining, is the amount of damages to which the libellants are entitled.

The rule of damages which has been laid down by the Supreme Court in collision cases, seems to me to be a just one in this case. I refer to the case of *Williamson vs. Barnett*, 13 Howard, 101. I shall allow the libellants the following items:

Furniture lost,	-	-	-	-	-	\$500 00
Cost of raising steamer,	-	-	-	-	-	1,567 36
Net earning for 60 days, which it would take to raise and repair her,	-	-	-	-	-	1,890 00
Necessary repairs, to place her in as good a condition as before the accident,	-	-	-	-	-	2,890 00
Cost of taking her to Baltimore, estimated at	-	-	-	-	-	158 00
						\$7,000 36

For which sum I will sign a decree. I do not think that, under all the circumstances, the libellants were justified in selling her at Havre de Grace; and I therefore decline to allow them the amount claimed by them, growing out of that sale, and the small amount realized from it. I think her leak might have been stopped, so far

¹ See the very late case of *Hilliard v. Richardson*, 3 Grey's Rep. 354.—*Eds. Am. Law Reg.*

as to have enabled the libellants to bring her round to Baltimore, where she could be taken upon the Railway and repaired; and the intelligent gentlemen who examined her at the request of the libellants, recommended this course, and gave it as their opinion, that there would be but little risk in bringing her to Baltimore.

In the Supreme Court of the State of New York.

FREEMAN CLARKE vs. THE CITY OF ROCHESTER.

1. Where city of Rochester had become subscribers to the capital stock of a Railroad, under a special Act of Assembly, *held*, that the contract was void, as being in violation of the Constitution of New York. The rights of eminent domain and taxation considered.
2. The power to tax property in aid of a private corporation, or for the purchase of its stock, is not among the ordinary powers of a municipal government, and requires special legislation to confer it, and this legislation is, in New York, prohibited by the constitution. Per ALLEN, J.
3. The principle settled in *Barto vs. Himrod*, 4 Seld. 488, recognized and approved.

The plaintiff brings this action to recover the money paid upon a contract between the parties, bearing date March 2d, 1858, in respect to three hundred thousand dollars of the capital stock of the Genesee Valley Railroad Company, for which the defendants, in their corporate capacity, had become subscribers under the provisions of chapter 389 of the laws of 1851, and in part payment for which they had issued and sold the bonds of the city to the amount of one hundred thousand dollars.

By the agreement between the parties, the plaintiff agreed to purchase of the defendants the stock subscribed for by them, and to pay for the same at the times and in the manner particularly specified, and the defendants agreed to issue the city bonds for the remaining two hundred thousand dollars, and deliver the same to the plaintiff from time to time, as provided by the contract.

The plaintiff has paid to the city at different times, in part performance of the contract on his part, the aggregate sum of forty-one thousand seven hundred and forty dollars, and has received on

the premiums of the bonds sold by the city, and which, in pursuance of the terms of the agreement, were paid to the plaintiff, and by way of interest paid by the Railroad Company upon the payments made by the city upon their subscription, the sum of twenty-six thousand five hundred and forty-one dollars and eighty-seven cents.

The cause was tried at the Monroe Circuit, by the court, without a jury.

S. Matthews, for plaintiff.

E. Griffin and *O. Hastings*, for defendants.

The opinion of the court was delivered by

ALLEN, J.—The plaintiff bases his claim to recover, in this action, in the want of power in the city of Rochester to become a subscriber to, or holder of the capital stock of the Genesee Valley Railroad Company, or to issue the bonds of the city for the purposes mentioned in the agreement of the parties, claiming that the law under which the defendants have assumed to act in the premises, is unconstitutional and void. The provisions of the statute under which the authority was assumed by the defendants, make a part of an act amending the act to amend and consolidate the several acts relating to the city of Rochester. (Chapter 389 of Laws of 1851.)

Sections 285 to 292 of that act, inclusive, provide for the borrowing by the Common Council, on the faith and credit of the city, of three hundred thousand dollars, and the execution of bonds therefor, under their corporate seal, and the investment of the money thus raised in the stock of the Genesee Valley Railroad Company, by a subscription to, or a purchase of, such stock, and for the holding, management and disposal of the stock, the receipt of the dividends, and the collection by tax upon the real and personal estate of the city, of any sums necessary to defray the interest upon the bonds after the application of the dividends to that purpose. By section 291, it is declared that the sections conferring this power upon the Common Council, and prescribing the mode of its execu-

tion (285 to 291) should **not** take effect until they should have been submitted to the electors of the city, at an election to be held as in the act prescribed.

A city, as a public municipal corporation, organized for political and governmental purposes, is in many respects subject to different rules from those which are applicable to mere private corporations. The binding force of the organic law upon the corporators does not depend at all upon their assent to its terms, and there is nothing in the charter, or act of organization, having the effect of a contract between the State and the body corporate thus formed. City governments are said to be *imperia in imperio* ; they are auxiliaries to the government, having the privilege of managing their own local interests, under the authority and protection of the State.

The city authorities, representing the people secondarily to the legislature, can only be invested with that power over the property of the individual citizen which the people primarily, or the legislature as the representatives of all the people, originally possessed.

In other words, while private corporations may be formed for any and all lawful purposes, the corporations by accepting of the charter, assenting to and becoming bound by its terms, and the sovereign as well as the corporators being bound by the contract thus expressed, a municipal corporation can only be formed for political purposes, and invested with such powers as are necessary or incidental to the purposes of a local government. The sovereign power by which the corporation is created, may repeal, alter or modify the charter. The powers conferred are mere municipal regulations, subject to the absolute control of the government, with the qualification that the power delegated to the subordinate legislature cannot exceed that possessed by the legislature from which the power is immediately derived.

The legislature of the State cannot do that by a local and subordinate legislative body, deriving all their powers from it, which it could not do directly by its own proper legislative enactment. The legislative power of the State is vested in the Senate and Assembly. This power is not defined by the constitution, but constant restrictions and limitations upon its exercise, are imposed by it, and subject

to the restrictions and limitations of that instrument, the power of the legislature acting in the place of and representing the people, is ample to do all the people could rightfully do. The restrictions are either imposed in express terms, or are the result of a necessary implication from the language employed, or the powers expressly conferred. For example, the constitution by authorizing the appropriation of private property to public use, and in a single instance for a private use, impliedly declares that for any other purpose private property shall not be taken—per Savage, Chief Justice, *in the matter of Albany Street*, 11 Wend. Rep. 149. The constitution has been denominated the commission of the legislature, within the pale of which they must act, and one great utility of constitutions in a government like ours, consists in defining with some accuracy the boundaries within which the powers of the several departments of the government are limited, and the protection thus afforded to the individual citizen, against the encroachment of delegated power, which is said to be always aggressive. There is no provision in the constitution of this State, in terms prohibiting the legislature from compelling the citizen, either individually or in communities, against their will, to become shareholders in companies formed for the construction of canals, railroads, manufacturing, commercial, or other purposes, or denying to the legislature the right to judge for the citizen what investments of capital shall be made by him, or in what business he shall embark, either with a view to a profitable return, or to the benefit of his property at large, or the greater benefit of the public; neither is such power conferred, and its assumption is adverse to the spirit of the whole instrument, and inconsistent with the just rights of the people.

No person shall be deprived of life, liberty or property, without due process of law, nor shall private property be taken for public use without just compensation; and but one case is recognized as a fit case for the taking of private property for private purposes, and that is the case of a necessary private road, which being expressly provided for according to well established rules of construction, excludes every other case. Art. 1, §§ 6, 7. The credit of the State shall not in any manner be given or loaned to, or in aid of

any individual, association or corporation, (Art. 7, § 9,) and an effort was made by § 12 of the same article, to restrict the power of the legislature to contract debts, by or on behalf of the State, even for the legitimate public purposes. That the effort has not proved successful, does not detract from the force of the provision, as evidence of the intent of its framers.

And sections 13 and 14 are designed to induce caution in the imposition of taxes by the legislature.

It is also enjoined upon the legislature to provide for the organization of cities and incorporated villages, and to restrict their power of taxation, assessment, borrowing money and contracting debts, and loaning their credit; so as to prevent abuses in assessments, and in contracting debts by such municipal corporations. Art. 8, § 9.

These several provisions brought together tend to show the general scope and design of the instrument, and the intent of its framers, and thus throw some light upon particular provisions bearing more directly upon the question before me, and aid in their construction; at least, they show that it was no part of the design of its framers to confer any enlarged or doubtful powers upon the State or municipal legislatures over the property of the citizen.

The property of the citizen is, to some extent, in the power and at the disposal of the government. Its use may to some extent be regulated. It may be forfeited for crime; it may be condemned by appropriate process as injurious to the health or morals of the public, or to the well-being and safety of the State; it is liable to be taken for public purposes upon just compensation made; and it is liable to taxation and assessment for the general purposes of the government, or for local benefits and improvements. But the citizen does not hold his property by so slight a tenure that it can be taken from him by the legislature, for any and all purposes, either under the guise and form of taxation, or color and pretence of exercising any of the other recognized powers of the government. All power in the legislature over the property of the citizen is derived from the people, and is either expressly conferred by the terms of the constitution, or impliedly granted, as incidental to some

power expressly given, or results from the necessities of government, and exists as an incident to government.

I know of but two ways in which, except by process of law, the property of an individual may, without his consent, be taken from him, or in any way encumbered. The one is in virtue of the right of eminent domain, for which provision is made by the constitution, and the other is by taxation, the right of which is necessarily inherent in the government. The citizen is protected against any other attempt upon his property, by the declaration that he shall not be deprived of it except by due process of law.

The proceedings of the Common Council of the city of Rochester, by which they have undertaken to bind the corporation, and to this extent burthen and encumber the taxable property of the city, for the payment of three hundred thousand dollars in return for a like amount of capital stock of a railroad company, is not an attempt to take property by due process of law, which imports a suit instituted and conducted according to the present forms. *Taylor vs. Porter*, 4 Hill Rep. 140. Neither is it, nor is it claimed, to be an attempt to exercise the right of eminent domain, the power to exercise which may be delegated by the legislature to a municipal corporation to be exercised within the territorial limits of the city or village.

The right of eminent domain operates upon an individual,—the right of taxation upon a community, or a class of persons in a community. *People vs. Brooklyn*, 4 Comstock Rep. 419. The authority of the legislature to confer upon the Common Council the power to purchase or subscribe to the capital stock of the Genesee Valley Railroad Company, and to borrow money upon the corporate bonds of the city to pay for the same, if it exists, must rest for its foundation upon the right of taxation, which is a right existing of necessity. Although the projectors of the law, and those who favored its sanction by the electors of the city of Rochester, may not have supposed that the act of subscription to, or the purchase of the stock of the company, and the payment therefor in the bonds of the city, would result in any actual burthen to the tax-payers, and although it is possible that in no event would loss or harm

come to the city, and that property holders will realize all the benefits, direct and indirect, which were anticipated from the construction of the road, and the stock received will redeem the bonds of the city, and in the meantime by dividends of its earnings meet the interest as it accrues, it must nevertheless be treated for all purposes as a burthen to the amount of the bonds and the accumulating interest imposed by the sovereign power upon the taxable property of the city, and whether payable by tax, to be raised this year or in 1873, is immaterial so far as any principle is involved on the question of authority.

If the legislature or the Common Council, acting under its authority, had the right to charge the taxable inhabitants and property of the city with the payment of this large amount in 1873, they had the right, and a better and clearer right, to require its payment in 1856, or by tax to be levied at once upon their own property, rather than that of posterity, who have no voice in the matter. For the power being conceded, there is no jurisdiction vested anywhere to control or regulate its exercise. In matters within its jurisdiction the legislature is supreme,—it cannot be controlled as to the amount of taxes, where it may lawfully impose any, or the mode, manner, or time of their collection.

The act contemplates a deficiency of dividends to meet the accruing interest, and therefore provides that the deficiency shall be met by a tax upon the property of the city, and it also contemplates a possible sale of the stock below par, and in that event, the necessary result would be a tax to redeem the bonds to the amount of the deficiency. But it is sufficient for the purposes of this case, that the burthen is imposed upon the property of the city by the execution of the corporate bonds, which, if the law is valid, may be enforced against the city by tax. Could, then, the legislature of the State, directly by act of its own, or indirectly by act of the Common Council, proceeding in subordination to, and by authority of the legislature, have imposed a tax of \$300,000 upon the taxable property of the city, to be paid when collected to the Genesee Valley Railroad Company, or any holder of its stock, whether named in the act or not, upon the transfer to the city authorities of that

amount of the stock of that road? It is clearly a question as to the right of taxation, and not of eminent domain. Judge Ruggles, in *The People vs. Brooklyn*, says; "that money cannot be exacted by the government by right of eminent domain, excepting, perhaps, for the direct use of the State at large, and when the State at large is to make compensation." "The framers of the constitution could not have intended to delegate to municipal corporations the right of taking money under this power, because it is entirely unnecessary."

Taxation is an incident to sovereignty, and by it the public burthens are apportioned among those who ought, in the judgment of the legislature, to bear them, and it is said by Chief Justice Marshall, in *McCulloch vs. Maryland*, 4 Wheaton Rep. 316, "that as the exigencies of the government cannot be limited, the people of a State impose no limits to the exercise of this right of taxation," and the same doctrine is asserted in substance, by the same judge, in *The Providence Bank vs. Billings*, 4 Peters' Rep. 514. Both cases, however, assume that taxes are only to be imposed to meet the exigencies of the State for the discharge of the public burthens, and that it is only *those burthens* in the apportionment and levying of which the legislature of a State is supreme, or in regard to which they have any authority. Judge Ruggles in the case before cited, says: "Taxation exacts money or services from individuals, *as and for their respective shares of contribution to any public burthen.*"

In *The State Bank of Ohio vs. Knoop*, 16 How. Rep. 369, McLean, Justice, in pronouncing the judgment of the court, says: "The power of taxation has been compared to that of eminent domain, and it is said as regards the question before us, they are substantially the same. These powers exist in the same sovereignty, but their exercise involves different principles. Property may be appropriated for public purposes, but it must be paid for. Taxes are assessed on property for the support of the government, under a legislative act."

Whenever a tax is imposed by the sovereign power of the State, it will be assumed, unless the contrary clearly appear by the act

itself, that an exigency or necessity existed, and that it is as for a part of the public burthen proper; and if in any case a law of the State imposing a general tax should be held invalid for want of jurisdiction, it must be palpable that the public are not in any manner interested in it, as would be the case of a law, directing a tax to be levied and the avails given to a particular individual, or appropriated to some admitted private purpose, in which the public had no concern, and from which they could derive no benefit. That the right of taxation for such a purpose is among the reserved rights of the people over the property of the State, or among the inherent powers of the government, I am not prepared to believe.

The legislature may, in legislating for a particular locality, regulate the burthens and expenses of its government, and make the property of the locality to bear all the burthens and expenses incident to its government; this power may be delegated to a local legislature, as the Common Council of a city. But the local burthens to be borne must, I think, be confined to the expenses incident to the locality, and the particular community sought to be taxed.

The city of Rochester could not properly be taxed for the support of the local government of the city of Auburn. The legislature might provide by law a proper police for the city, make all necessary sanitary regulations, cause all necessary streets to be laid out, opened and worked, and all local improvements to be made, and do whatever else, within the locality, they should deem proper for the good government of the community, and assess the expenses as a part of the public burthen, upon the community for whose benefit the expenses should be incurred, or such part of the community as they should think ought, by reason of particular benefits, to be charged, and this power may be delegated to the Common Council of a city for the locality embraced within its boundaries.

But the jurisdiction of the substituted legislature is strictly local, and the burthens which they are authorized to impose upon the constituent body, must be directly incidental to their government, and be strictly such as concern them as a community bound together

by their charter, for municipal purposes. A city or other locality may be taxed by reason of local benefits, for a public work, beyond what the residue of the State is taxed for the same object. *Thomas vs. Leland*, 24 Wend. Rep. 65. The entire work is a public work, and its cost a public burthen, in the apportionment of which the legislature have a discretion which cannot be controlled. This does not prove that every project requiring the expenditure of money is a public burthen, the proper subject of a tax, because the legislature, State or local, so elect to name it; and it by no means follows, that they can be taxed for the benefit of a private corporation, although the work undertaken by it is so far public that it will be considered as representing the State in the exercise of the right of eminent domain in the entering upon and taking property necessary to its construction. A bill appropriating the public moneys or property to the use of such a corporation, would require a two-thirds vote of the legislature, as an appropriation of the public moneys, &c., to a private purpose. Constitution, Art. 1, § 9. Smith on Statutes, &c., 418 and § 29.

But the acts of the Legislature and Common Council involved in this action, do not profess to impose a tax, or to provide for a tax in *futuro*, either absolutely or upon any contingency, in aid of the construction of any work, public or private. They simply provide for a certain number of shares of the capital stock of a private corporation, in virtue of which the city is to become a shareholder, with all the rights, privileges and liabilities of other shareholders.

The building of the road contemplated, may or may not be of great incidental advantage to the city of Rochester, and greatly appreciate the value of real property within its limits, but this being conceded, it will be difficult to prove that the purchase of the stock in the company is within the legitimate power of the legislature or the Common Council, or that its cost is among the burthens which can be the proper subject of taxation. The building of manufactories, the establishment of large commercial houses, and extensive business and commercial operations, and the building and sailing of vessels, may be each and all essential to the prosperity of a city, and may all be accomplished by incorporated or unincorporated

associations, organized for the purpose ; but it has not, that I am aware of, been supposed that a city could properly become a partner or stockholder in any such association, and levy by tax upon the property of the city, the necessary contributions for the purpose. If so, then a city can, by act of the legislature, become one vast railroad, manufacturing or commercial corporation, or if thought best, a banking association. If individuals choose to invest their property or credit in enterprises of that character, they may do so, and no law will be invoked to prohibit it, but the option whether to embark in them or not, should be, and I think is, with the individual citizen, and not with his representatives in the city or State government. It is not necessary to say that municipal corporations may not in any case exercise a special franchise vested in them by the legislature, with a view to the increase of their revenue, an enhancement of the public property, or a diminution of the necessary public expenditures.

The right of taxation, however, can only be exercised either by the legislature or the municipal corporation, in respect to the proper public burthens incident to the city government and the exercise of the political powers ; for as to such only does the necessity of taxation exist, and not to enable the city government to become traders, merchants, bankers, ship-owners, manufacturers, or shareholders or partners in business associations, incorporated or unincorporated.

And a special franchise thus to deal with the property of the citizen, cannot rightly be exercised by the government, or municipal corporations formed under it.

To become dealers in stocks of private corporations, with a view to profit, or stockholders with a view to future revenue, is not one of the incidents of a city government, to accomplish which they may tax the property within the city limits.

In the nature of things, there can be no necessity for the exercise of such a power, and as the right of taxation rests upon the necessities of the case, the power cannot exist. That the work contemplated by the private corporation may, and probably will, prove beneficial to the interests of the city, does not vary the question. The purchase of the stock by the city may or may not be essential

to enable the corporation to perform its contract. It is enough that the city do not undertake the work, but merely become stock dealers, and they are not even bound to aid the company by subscribing to the stock—they may go into the market and buy it of the stockholders.

The work is in no way, and by no act recognized or treated as a public work, to be done by and at the expense, and for the benefit of the city, and as one of the legitimate duties resting on the city government. The decision of this question might, I think, very properly be rested in the absence of any express power conferred by the people in the constitution, and aside from any of the prohibitory and restraining clauses in that instrument, upon the absolute want of power in municipal corporations to burthen or tax the property of the citizen for the purpose named, and the want of jurisdiction in the State by legislation to confer the right. But the prohibitions of the constitution are, I think, ample to protect the citizen against taxes and burthens of this nature. Without referring more particularly now to the several provisions of the constitution in restraint of the power of the legislature over the property and credit of the whole State, and which would seem, in their spirit, to prohibit the granting of a power to a local government, in respect to the property and credit of a local community, which is expressly denied to the State government in respect to the entire public, I will simply refer to a provision which, I think, expressly forbids the legislature to grant the power which the act in question assumes to confer upon the Common Council of Rochester. The 9th section of article 8, was designed for the protection of the tax-payers, in cities and villages, against unwise and inexpedient taxation for purposes within the scope of the ordinary municipal legislature, and imposes a duty upon the legislature in respect to it. This duty, so far as a positive duty is enjoined, it is true, is one of imperfect obligation, and may not be enforced, and that it has been so esteemed by the legislature upon whom it was designed to act, is quite clear from an inspection of the Session Laws of the State from 1846 to the present time.

But of the propriety of restricting the power of cities in the exercise of their proper functions, in the respects named in this sec-

tion, the legislature must of necessity, be the exclusive judges, and it must be assumed by the other departments of the government, that what they have done, or omitted to do, in this direction, has been for good and sufficient reasons and in the exercise of a sound discretion.

But the section has a wider scope, and in the duty enjoined to restrict the power of the municipal legislatures to tax the property, or loan the credit of cities and villages, there is by a very plain and necessary implication, an absolute prohibition to enlarge their powers. A discretion is vested in the legislature as to the restriction, but none whatever in regard to the granting of new and enlarged powers in respect to taxation, and the creation of debts.

The power to tax property in aid of a private corporation, or for the purchase of its stock, is not among the ordinary powers of a municipal and local government, and require special legislation to confer it, and this special legislation is, I think, clearly prohibited by this section of the constitution.

Without this effect the provision is but an expression of opinion, a recommendation to the legislature, to which heed may or may not be given, and to give it significance and any effect as a part of the fundamental law of the land, it must be construed as an absolute restriction upon the powers of the legislature in conferring powers upon municipal corporations. This is its spirit and interest, and it must have this effect, or it has no practical force. There was an attempt to amend the provision, so as to save by implication, debts before contracted by cities and villages, but the amendment was negatived, and the section was adopted with only two dissenting votes, as it was introduced, and without amendment. Debates of Convention, *Argus* ed. 829. In the judgment of the convention, municipal corporations, in the exercise of their ordinary political functions, needed legislative restraint, and that their powers to tax the property, or charge the city with a debt, could not, with a due regard to the rights of its property holders and citizens, be enlarged; and in this section they have in substance and effect so said, and by it the legislative power of the State is restricted and limited: and as the act in question is in contravention of this provision of the constitution, it is void.

Again, within the principle settled by the Court of Appeals, in *Barto vs. Himrod*, 4 Seld. Rep. 488, the act of the legislature, under which the defendants assumed to act, is unconstitutional and void, for the reason that the fact of its becoming a law was made to depend upon the result of a popular vote. The authority to incorporate cities and villages, to prescribe their boundaries and define their powers and the mode and manner of their execution is devolved upon the legislature, and they cannot delegate this power, or devolve the duty upon any other body. I am unable to distinguish this case from that cited.

To what extent the sovereign power of the State was to be delegated to and vested in the Common Council of the city; in what cases, and to what extent they should possess the power, to charge the taxable property of the city, by immediate taxation, or by contracting debts to be paid in the future, and what in all respects should be the extent of the discretion and power of the Council as the local legislature for the territory embraced within the boundaries of the city, should have been definitely settled by the legislature as peculiarly within their province. The expediency of laws of this character is to be judged of by the legislature, and they cannot shrink from the constitutional responsibility resting upon them.

It is not the case of a law conferring new powers, or additional franchises upon a private corporation, which the corporation may elect to accept or not, as they deem expedient. This is the case of a law making provision for the government of a portion of the State, the exercise of a portion of the sovereign power of the State in a particular locality, and over the inhabitants residing within certain territorial limits, and all the people of that locality, as well as of the entire State, had committed it to the legislature to make and declare the law in that, as in every other matter under the constitution, and the minority have never agreed that a law passed by a majority vote at a popular election, should bind them or their estates, whether such law affects the whole State, or only a small portion of it. The vote of the city, as provided for by the act, was not to advise or control the Common Council in the exercise of their discretion in the matter of subscribing for the stock and issuing the

city bonds after the law had taken effect, but to decide whether the act vesting the discretion in the Council should become a law or not, which is the very case decided in *Barto vs. Himrod*. It would have been different, had the act of the legislature vested the power in the city government, but restricted the Common Council in its exercise, and made the exercise to depend upon the contingency of a favorable expression by the electors of the city ; but the question submitted was, whether the power should be conferred upon the city council to act in the premises, which rendered the law unconstitutional and void.

It followed, if I am right upon either of the three propositions considered, that the contract between the parties is absolutely void, and that the defendants cannot perform the same upon their part, and that if they in form fulfill their agreement and execute and deliver to the plaintiff the corporate bonds of the city, according to its terms, they would be worthless. The agreement of the plaintiff is therefore without consideration, and could not be enforced against him, and the money paid by him in part performance was paid without consideration, and may be recovered back in this action. The contract is still executory, and being incapable of performance without fault in the plaintiff, may be rescinded by him and an action maintained for the recovery of the money paid.

The defendants have received so much money, which, *ex æquo et bono*, belongs to the plaintiff. *Chitty on Contracts*, 622, 3—636, 7 ; *Young vs. Cole*, 3 Bing. N. C. 724 ; *Morgan vs. Groff*, 4 Barb. Rep. 524 ; *Rice vs. Peet*, 15 Johns. Rep. 503 ; *Gillett vs. Maynard*, 5 Johns. Rep. 85 ; *White vs. Franklin Bank*, 22 Pick. Rep. 181.

The plaintiff has, however, received certain sums of money from the defendants, and upon their order or draft upon the railroad corporation, which should be accounted for by him.

To this extent he has been benefited by the contract and by the acts of the defendants in the transaction, and has received money to which he is not entitled, and which, but for the contract, would have been received by the defendants. This is the proper subject

of a set-off in this action, and must be deducted from the amount paid by the plaintiff.

This amount he has received from the defendants, and is estopped from denying their title to it. Judgment must be given for the plaintiff for the balance, with interest, to wit, \$18,527 54.¹

In the Supreme Court of New York—Oswego General Term, 1856.

ISAAC H. BROWN *against* JACOB GOLDSMITH ET AL.

1. When a party calls for a part that was said at an interview of the parties, it does not follow that the other party may show all that was said. He may show so much of the conversation as made a part of the negotiations, or a part of the *res gesta*.
2. The court will not grant a new trial, even if the ruling of the judge was wrong ; if upon the whole case justice has been done.

This action was upon a contract to pay the plaintiff a certain sum for making collections. The contract was by parol. The evidence showed the defendant settled the suit after the plaintiff had commenced, and without the consent of the plaintiff, on the ground that the plaintiff had sued a party that he agreed not to prosecute. The plaintiff in this suit showed by a witness that he was present when the defendants settled the suit. The defendants' counsel asked for all that was said at that interview, with the intention of showing what the defendants said about plaintiff's taking the claim. The justices trying the cause admitted the evidence, and the jury returned a verdict for the defendants.

The plaintiff appealed.

Charles Andrews, for plaintiff.

N. F. Graves, for defendants.

The opinion of the court was delivered by

BACON, J.—I am inclined to think that the testimony allowed to be given on cross-examination of the witness, Rosenbeck, was improperly admitted. It was on the presumption that a portion of the conversation had been given, and the defendants were entitled.

¹ The reader is referred to the cases of *Sharpless v. Philadelphia*, 9 Harris, 147–188; 2 Am. Law Reg., 1, 27, 85; *Moers v. Reading*, 9 Harris, 188–203.—*Eds. Am. Law Reg.*

to the whole, but as the case reads, no such foundation seems to have been laid for its introduction. But the same facts, in substance, were afterwards proved by the witness, Rosenbaum, and I can see no valid objection to his testimony. It was not in conflict with any thing stated in the letters which alluded to a verbal agreement, which this testimony explained and illustrated. If there had been no cross-examination of Rosenbeck, the jury were well warranted, by the testimony of Rosenbaum, in arriving at the conclusion they did. The case was put to the jury as one of conflicting testimony between Rosenbaum and the son of the plaintiff, and as between the two, it is evident they believed the former told the truth, no injustice having been done, the verdict should not be set aside. The judgment, in my opinion, should, accordingly, be affirmed.

ALLEN, J.—I am of opinion that the justice erred in admitting evidence of the declaration of defendants at the time they settled the debt against Adler & Graven. The plaintiff had not called for any declarations of the defendant on that occasion. They had proved a fact, to wit:—the compromise and discharge of the debt; and it would probably have been competent for defendants to prove what was said concerning the settlement, and so much of the conversation as made a part of the negotiation as a part of the *res gestæ*, and to show what was done, and had the plaintiff called for any part of the conversation, the defendants could only have given so much of the residue of the conversation, as tended to qualify that given in evidence by the plaintiffs, and no more; that is, they could have given all upon the same subject.¹ But there is no pretence that the plaintiff had directly or indirectly called for any declarations of the defendants concerning the agreement between them, and the conversation was admitted under the offer to show “what defendant may have said about plaintiff’s taking the claim.” The evidence was erroneously admitted, and we cannot say that it did not influence the result.

The judgment must be reversed and a new trial granted; costs to abide events. New trial granted.

¹ See 1 Greenl. on Evid. § 108.—*Eds. Am. Law Reg.*

RECENT ENGLISH DECISIONS.

In the Court of Common Pleas.

TARRANT vs. WEBB.

1. It is a well established rule of law, that a servant cannot ordinarily sue his master for an injury sustained through the negligence of a fellow-servant; but the master is bound to use due care in the selection of competent servants, and is liable for negligence in employing incompetent persons.
2. He is not bound to warrant the competency of his servants; and in an action against him for an injury done by one of his servants to another, the question for the jury is, not whether the servant was incompetent, but whether the master did not exercise due care in employing him.

This was an action for injury done to the plaintiff by the falling of a scaffolding; and the declaration alleged that the plaintiff was employed to do certain work for the defendant on a scaffolding erected by the defendant for that purpose, and that the defendant so carelessly and negligently erected the scaffolding that the plaintiff was exposed to unreasonable risk, and the scaffolding gave way, and the plaintiff was thrown therefrom, and seriously injured.

Plea—Not guilty.

At the trial, (*coram* Crowder, J.,) at the Middlesex sittings in Trinity term, it appeared that the scaffolding was erected by a servant of the defendant; and the learned judge, in summing up, told the jury that the defendant would be liable if he employed incompetent persons to erect the scaffolding. It did not appear that the defendant knew his servant to be incompetent. Upon this the jury found a verdict for the plaintiff, with 25*l.* damages.

A rule *nisi* for a new trial was obtained on the ground of misdirection, for that the employment by the defendant of incompetent persons simply would not make him liable, and at all events would not do so unless he knew of the incompetency, and the plaintiff did not.

Udall showed cause.—The evidence showed that the parties knew that it was necessary, in order to make the scaffolding safe, to use a pole, which was not used. The objection made to the

summing up of the learned judge was this: the case of *Wigmore v. Jay* (5 Exch. Rep. 354; s. c. 19 Law J. Rep. (N. S.) Exch. 300) was handed up to him and relied upon, and he ruled, according to that case, that the ordinary rule as to the responsibility of a master for the negligence of a servant does not apply where the person injured is a fellow-servant, unless there be evidence that the person employed, and who caused the injury, was an improper person to employ for the purpose in question. But it is now contended, that another proposition is to be added to this doctrine, and that, in order to recover against the master, it must be shown affirmatively by the plaintiff that the master knew that the servant employed was incompetent. That is a principle which ought not to be established. The question was very fully considered in the case of *Hutchinson v. The York, Newcastle and Berwick Railway Company*, (5 Exch. Rep. 343; s. c. 19 Law J. Rep. (N. S.) Exch. 296.) That was an action by the representative of a servant of the railway company, killed by the negligence of another servant in guiding a locomotive engine. The company pleaded that the collision happened by the negligence of their servants employed in guiding the engines, &c., and not otherwise, and that their servants were fit and competent persons for this purpose, and the plea was held good.

[JERVIS, C. J.—It may not be necessary for the other servants to make out that the master knew of the incompetency of his servant, but it may be enough to say that he was bound to use ordinary care to employ competent persons.]

The learned judge told the jury that if they thought the defendant interfered in the erecting of the scaffolding, or that the person he employed was incompetent, they should find for the plaintiff. It is contended that that was a proper direction.

[JERVIS, C. J.—As to both points, it seems to me that it was necessary to add something more. As to the first, if the defendant interfered with competent skill, he would not be liable.]

In the judgment in *Hutchinson v. The York, Newcastle and Berwick Railway Company*, (5 Exch. Rep. 351,) Alderson, B. says that "the master is not in general responsible when he has selected persons of competent care and skill."

[JERVIS, C. J.—It is not that the master must warrant the competency of the persons whom he employs, but that he must take care to select for the work persons who are competent.]

In the ordinary case, where a servant, incompetent to drive a carriage, does drive, and causes an accident, the master is liable.

[CRESSWELL, J.—But that is not the case of injury to a fellow-servant.]

In *Skip v. The Eastern Counties Railway Company*, (23 Law J. Rep. (N. S.) Exch. 23,) Parke, B., says the company “are indeed bound to see that their servants are persons of proper care and skill,” but that is all. In the case of *Patterson v. Wallace & Co.*, (1 M’Queen, 748,) in the House of Lords, there is no qualification of the rule laid down in *Wigmore v. Jay*. Lord Cranworth said, that the law of England agreed with that of Scotland, in holding that a master is bound to take all reasonable precautions for the safety of his workmen.

[CRESSWELL, J.—Is not the real distinction this: that when an injury is done by one servant to another, the rule of *respondet superior* does not apply? In such case the servant injured is bound to go further, and to show negligence in the master in order to make him liable. In a case of this kind, the negligence which causes the wrong is that of the servant, and not that of the master; and the question then arises whether there was any negligence in the master in not employing competent servants.]

M. Smith and *G. B. Hughes* appeared to support the rule, but were not called upon by the court.

JERVIS, C. J.—I am of opinion in this case that there must be a new trial. The rule is now established, that if a workman meets with an injury from the negligence of a fellow-workman, no action will ordinarily lie against the master. As my brother Cresswell has put it, the superior is not responsible as between his servants, but he may be liable in case of negligence of his own. There may be a doubt as to the policy of the law, but it is now quite a settled one. Negligence may consist of more than one matter; but it cannot exist if the master does his best to employ competent persons. He cannot warrant the competency of his servants. The jury in this

case might have been of opinion that the defendant had taken great care in the selection of the person who erected the scaffolding, and yet that he was incompetent for the work. I think, therefore, that the rule for a new trial ought to be absolute.

CRESSWELL, J., and WILLIAMS, J., concurred.

Rule discharged.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

[FROM 2 E. D. SMITH'S REPORTS.]

ACTION.

Negligence—Left hand track of Road.—In an action brought in the marine court by the owner of a horse and cart, for injuries caused by a collision with one of the cars of a railroad company, the justice charged the jury, "that if the plaintiff was, in their opinion, doing his best to get out of the defendant's way it was all that could be required of him; that if he was so doing, the defendants were bound at their peril, to stop their cars to avoid collision; and if they had not sufficient power to do so, or if they omitted to stop their cars, they were responsible for the consequences." *Held*, that the charge being in effect, that if neither party was in fault, the plaintiff was entitled to recover, was palpably erroneous and unjust. *Altrueter vs. The Hudson River Railroad Co.*, p. 151.

Held, also, that the question, whether the defendants were guilty of negligence, was as material as whether the plaintiff was; and should have been made the primary question, instead of reversing the order, and telling the jury that if the plaintiff was not guilty of negligence, they must assume that the defendants were. *Ib.*

The mere fact that a car of a railroad company in the city of New York is proceeding on the left-hand track, will not of itself, charge the company with fault, and subject them to damages resulting from an accident. *Id.*

Passenger's baggage—Liability on continuous roads.—A passenger procured a ticket for Montreal, at the office of the New Haven Railroad Company, in New York; instead of giving his valise into the charge of the agents of the company and receiving their check therefor, he proceeded with his valise in his own charge to New Haven, the terminus of the company's

road, where he delivered the valise to the agent of a connecting railroad company, who checked it through to another point on the route. It appeared that a joint committee appointed by the various lines between New York and Montreal regulated the time of running their several trains, each company, however, paying its own expenses without reference to the others. The ticket was a strip of paper, divided into coupons, whereof one was to be detached and surrendered to the conductor of each line on the route. Through tickets for the entire distance, or for intermediate places, were sold in New York by one general agent appointed by each company, separately. The proceeds of sales of through tickets were distributed to the several companies each month according to the respective amounts of their established rates of fare. *Held*, that the New York and New Haven Company, whose road terminated in those cities, was not liable in an action for the loss of the valise. *Stratton vs. The New York and New Haven Railroad Co.* p. 184.

Held further, that the several companies on the route from New York to Montreal, were not jointly liable as copartners, for the negligence of the special agents of one of them. *Ib.*

Duty of owner of lot in excavating—Tenant.—Where, in blasting rocks on his own lots, an owner threw stones upon an adjoining lot, occupied by a person as tenant, and so extended his blast as to forcibly split out the rock in the lot of such person, undermining the foundations of his house, and rendering it insecure; *held*, that he was liable in damages to the tenant of such adjoining lot. *Gourdier vs. Cormack*, p. 200.

The liability attaches whether the injuries are committed negligently or in the use of all reasonable care. *Ib.*

The tenant in such case, recovers for the injury to his possession, not for an injury to the freehold, and he is entitled to whatever damages he sustained by the interference with his possessions. *Ib.*

It seems that an owner may not be liable for the consequences of mere excavation on his own lot, prudently conducted, although the earth and walls of adjacent premises slide in for the want of protection. *Ib.*

Where the owners of a lot gave written notice, in their own name, of their intention to blast rock on such lot; *held*, in an action against them for injuries caused by the blasting, that the notice was *prima facie* evidence that they were themselves the actors in the work, and was sufficient to

render them liable for damages caused by their agents in executing the same, unless the contract between the agents and owners was proved to be such as would relieve the latter from responsibility. *Ib.*¹

Caveat emptor—Warranty of provisions—Contract.—Where, on a purchase of provisions, as merchandise, to be sold again by the buyer, they are in a situation to be, and are examined as fully as the buyer deems necessary, and there is no fraud nor express warranty, nor representations amounting to warranty, the maxim *caveat emptor* applies, and although on a subsequent further examination, a portion proves to be unsound and worthless, the buyer is liable for the contract price. *Hyland vs. Sherman*, p. 234.

Where a party agrees to purchase an article specified to be of a certain quality, he is not bound to accept and pay for a different article; and after delivery he has a reasonable time to examine and ascertain whether his contract is in fact fulfilled. But if he examines the article when tendered, retains it and pays the price, the sale is consummated, and the purchaser cannot then without having offered after a further examination, to return it, or given notice to the seller to resume possession, maintain an action to recover damages for the inferiority of the article delivered, to that called for by the contract. *Ely vs. O'Leary*, p. 355.

Where goods are delivered under an executory contract of sale, the purchaser is bound to accept them as a performance of the contract, or upon discovering their inferiority, reject them and give notice of such rejection, or his acquiescence in the quality will be presumed. *Otherwise*, it seems, where the action is not on the contract but is in the nature of an action on the case for fraud or deceit. Hence, where a party bound by an executory contract resorts to artifice, false packing, or other means to disguise the quality, and deceive the other party to the contract, he is liable for all the damages occasioned by his deceit or fraud. *Ib.*

But *it seems*, that where there is an express warranty or representation amounting to a warranty, different rules apply. *Ib.*

AGREEMENT.

Release—Alteration.—An alteration in the date of a general release, which purports to discharge the releesee from all claims and demands "to the day of the date," is a material alteration; and when made by the releesee after the execution by the releasor, and without his authority and assent, it would avoid the release. *Maybee vs. Sniffen*, p. 1.

¹ See *Grant v. McGuire*, 1 Dutcher N. J. Rep. 356.—*Eds. Am. Law Reg.*

The authorities are divided upon the question whether, when a material alteration appears upon the face of the instrument, it is to be presumed, in the absence of explanation, to have been made before or after the execution and delivery. *Ib.*

It seems, upon a review of adjudged cases, that the best rule and the one most in accordance with the judicial decisions, is that the instrument, with all the circumstances of its history, its nature—the appearance of the alteration, the possible motives to or against making it—and its effect upon the parties respectively, ought to be submitted to the jury; and the court cannot presume that the alteration was made after the signing, from the mere fact that it appears on the face of the instrument, whether under seal or otherwise. Ib.

In bar of a recovery on a money demand, a release was produced, which appeared on inspection to have had its date altered by the obliteration of the word “March,” and the substitution of “May.” There was some evidence that other releasors had executed the instrument before the plaintiff, and that they signed it after the day of the date as altered. It was not alleged that any claims had accrued to the plaintiff from the defendant, between the two dates, to constitute a motive for the change; *held* that there was no error in the decision of referees admitting the release in evidence. *Ib.*

Under such a state of facts, the question whether the instrument had been vitiated by a fraudulent alteration, is a question of fact for a jury or referees. *Ib.*

The fact that an instrument was actually executed at the time indicated by the date substituted for the original date, explains the alteration, and renders the instrument admissible in evidence. *Ib.*

CARRIERS.

Common Carriers—Liability—Notice.—The liability of a common carrier who receives and ships goods at New York, directed to a firm at a certain number and street in Philadelphia, continues after the arrival of the vessel at the wharf in that city, until notice is given to the consignee and reasonable time allowed him for their removal. *Barclay vs. Clyde*, p. 95.

But where the direction is to another and more distant point than that at which his own route terminates, the carrier's responsibility is at an end when he delivers all the goods, in the usual course of business, to the other carriers, to be forwarded by them. *Ib.*

Where certain furniture, belonging to the plaintiff, was boxed, and was transported by the defendants in their vessel, from New York to Philadelphia, and on its arrival was taken, with a bill of charges, by a carman in their employ, to the particular place designated, and there delivered to the persons to whom it was addressed, who paid the freight and cartage, *held* that it was competent in an action to recover damages for injuries to the articles, to prove their condition when received from the carman. *Ib.*

DAMAGES.

New Trial—Inadequate Damages.—The court may grant a new trial as well where the damages are inadequate as where they are excessive, if the case be such as clearly to indicate that the jury have acted under the influence of partiality, bias, or perverted judgment. *Richards vs. Sanford*, p. 349.

Accordingly, where a recovery was had in an action for the defendant's negligence, whereby the plaintiff was injured and sustained severe bruises upon his mouth and face, and one of his teeth was knocked out; it was *held* that the verdict of the jury for \$10 only, was grossly inadequate, and that the plaintiff was entitled to a new trial on payment of costs, unless the defendant should consent to a material increase in the amount of damages found. *Ib.*

Damages for Servant's negligence.—Where a person, without fault on his part, suffered damages from a horse running away; *held* that the owner thereof was liable, it appearing that his servant was negligent in not properly securing and restraining the horse, although the consequences of the accident were also chargeable upon a third person, who caused him to run by carelessly frightening him. *McCahill vs. Kipp*, p. 413.

EVIDENCE.

Waiver of proof—Insurance.—In an action upon a policy of insurance upon the life of B., whereby the defendants agreed to pay to A. (the plaintiff), \$100 within sixty days after notice and proof of the death of B.; *held* that the defendants having, upon receiving the preliminary proofs, placed their refusal to pay on the ground that there was no sufficient proof of the particulars of the plaintiff's interest, and having suffered the sixty days to elapse without any objection to the sufficiency of proof of death, had waived further proof of death, or admitted the sufficiency of that already furnished, and that after the sixty days it was too late to raise that objection. *Miller vs. The Eagle Life Ins. Co.*, p. 268.

No preliminary proof of interest is necessary before suit brought upon such a policy; there being no condition therein that such preliminary proof shall be furnished. *Ib.*

Mode of selling Stereotype plates—Sheriff's Sale.—Where a part of property sold under execution, consisted of stereotype plates which, although accessible, were not in accordance with the directory provisions of the statute, in actual view at the time of the sale; it was *held* that although a sheriff cannot sell by sample, yet, that for the purpose of furnishing criteria, whether the sale was so conducted as to bring the best price, it was competent to show that the plates would suffer injury by handling, that impressions therefrom were displayed, and that such was the usual mode of disposing at trade sales articles of the kind. *Bruce vs. Westervelt*, p. 440.

Upon a Sheriff's sale, under execution, of articles constituting the establishment of a publishing house, certain stereotype plates, being part of the property sold, were in a vault connected with the building, but apart from the rooms wherein the sale took place; *held* that the sale would have been void if the vault was locked or the plates were in such condition that they could not be reached and examined by the persons in attendance; but that the sale was valid if at the time thereof an opportunity was given to the purchasers to go and examine the plates, although the same were not immediately in view. *Ib.*

Look-out on Boat—Negligence.—Although due vigilance requires that a steamboat should at night have a competent person on the boat as a look-out, the absence thereof is not of itself sufficient evidence of negligence on the part of her owners to prevent a recovery against another vessel for a collision, where it appears from the lightness of the night and other circumstances, that the omission did not contribute to the accident. *Meller vs. Smith*, p. 462.

To warrant a recovery by the owners of a steamer for a collision with a schooner, they must show by a preponderance of evidence that the accident was occasioned by fault of the schooner, and it must not appear that any fault of the steamer conduced thereto. *Ib.*

SHORT NOTES OF RECENT ENGLISH CASES;

BEING A SELECTION OF ADJUDGED POINTS.

FARINA *vs.* SILVERLOCK. 6 De Gex, Mac. & G. 214.*Trade Mark—Label—Injunction to Restrain Printing of, dissolved.*

In this case the Lord Chancellor (reversing the decision of Sir W. Page Wood, V. C., who granted an injunction) held, that where a trade-mark consisted of a label in a certain form, and it was shown that in very many instances labels the same or similar to it might be sold for a *legitimate* purpose, in the absence of proof of actual fraud, the printing and sale of such labels ought not to be restrained, until the owner of the trade-mark, who alleged that they were used for a fraudulent purpose, had established his case by an action at law. "The Vice-Chancellor," said his lordship, "put the case in a manner which struck me forcibly at first; but I confess I cannot quite go along with him. He says, that where a person may be making and selling something for a lawful purpose, or may be making and selling it for an unlawful purpose, it will not do for him to say that he is making it to use for a lawful purpose; but he must show, in some way or other, that it is not to be used for an unlawful purpose. I think I can imagine cases where that reasoning would very properly apply; if, for instance, the article here was one the demand for which, perhaps, would be of rare occurrence, and there was only one dealer in it in this metropolis, and the defendant was a person who was selling thousands of these labels, in such a case, having reference to the article manufactured, it would be a very fair observation to say, that as there could be but one person who could lawfully give an order for the labels, it could not be imagined that the defendant's purpose was lawful, and then the court might interfere. If, however, there are dispersed over the country a hundred, or five hundred, or a thousand persons, for whom these labels might be legitimately made, I cannot think it reasonable to say, that the defendant's stock should be destroyed and his trade stopped, because he may sell to some person to whom he has no right to sell."

 KNIGHT *vs.* ROBINSON. 2 Kay & Johns. 503.
Will—Construction—Gift of Securities for Money—Passes Legal Estate.

A testator having by his will in 1832 given all his money, *securities for money*, household furniture, fixtures, &c., and all *other* the rest and residue

of his *personal estate* and effects, *subject to the payment of his just debts, and funeral and testamentary expenses and legacies*, to his wife, *her executors, administrators, and assigns*, absolutely; it was held by Sir W. Page Wood, V. C., that the legal estate of certain mortgaged hereditaments, which was vested in the testator at the date of his will, passed, as well as his beneficial interest therein, under the term "*securities for money*," and that the concurrence of the testator's heir was not necessary, therefore, to make an effectual conveyance of the mortgaged premises to a purchaser. "It appears to me," said his Honor, "that the view taken by Vice-Chancellor Parker in *Re King's Mortgage* (5 De G. & S. 646), is founded both upon principle and authority. The only distinction between that case and the present is, that in the former the gift was to the testator's wife, 'she paying thereout all the testator's debts, while here the gift is 'subject to the payment of' the testator's debts and legacies.

"It is perfectly true, that where there is a general devise of all a testator's real, or all his real and personal estate, subject to debts and legacies, then, as in *Doe d. Roylance v. Lightfoot*, (8 M. & W. 533) a dry legal estate in mortgage and trust estates will be held not to pass, because to hold the contrary would be, *quoad* such estates, to throw the debts and legacies upon a mere dry and naked trust estate. But when, as here, you get words such as '*securities for money*', then the observation of Sir John Leach, in *Renvoize v. Cooper* (6 Madd. 373), cited by Vice-Chancellor Parker, in *Re King's Mortgage* (5 De G. & S. 647), applies." And after citing *Doe d. Guest v. Bennett* (6 Exch. 892), his Honor added, "To hold that the testator has given the legal estate in a case where, as here, he has given the security, subject to the payment of his debts, is not to throw such debts upon a mere dry trust estate, because the donee can pay such debts out of the moneys recoverable upon the security. Therefore, in my opinion, the circumstance of this gift being subject to the payment of the testator's debts and legacies, does not make against the construction for which the plaintiff contends.

"The strongest argument urged against that construction was that which was founded upon the circumstance of the enumeration of the securities and other subject-matters of this gift being followed by the words '*and all other the rest and residue of my personal estate and effects*;' which point, it was said, to the inference that bonds and other securities short of the legal estate in a mortgage in fee, were exclusively intended by the testator. In answer to that, I refer to what Vice-Chancellor Parker says in *Re King's Mortgage*.

"It has been said, that the words 'securities for money' in this will were placed among words relating to personal estate; but that is the place in the will in which they might be expected to be found, the mortgage-money, being in fact personal estate. . . . I agree with Vice-Chancellor Parker, that *Galliot v. Moss*, (9 B. & C. 267) must be treated as overruled by the subsequent decisions. I also concur in what he says, that it cannot be reconciled with *Ex-parte Barber* (5 Sim. 451), or *Mather v. Thomas*, (6 Sim. 115; and see 10 Bing. 44)."

TENNANT vs. HEATHFIELD. 21 Beav. 256.

Will—Construction—Uterior Bequest on Failure of Prior Gift.

As a general rule, when a bequest is to take effect after the failure of a prior gift, the total failure of that gift will not prevent the ulterior bequest taking effect. Thus, where there was a bequest by a testator to his daughter for her separate use for life, and after her decease to her children, and in case of their deaths before the vesting of their shares, in trust for her next of kin, and the daughter never had any children, it was held by Sir J. Romilly, M. R., that her next of kin were nevertheless entitled. "The case of *Jones v. Westcomb*, (Prec. Ch. 316, 1 Eq. Ca. Ab. 245, pl. 10), and *Doe d. Watson v. Sheppard*, (1 Doug. 75), to which I was referred, appear to me to apply to this case. In the latter case the question was, whether you could imply an estate; that is not the case here.

"*Underwood v. Wing*, (19 Beav. 459; and 4 De G. M. & G. 633) no doubt might seem to have a bearing on this case, but, in my opinion, it has not, and it is perfectly distinct. I adhere to the decision I came to in that case, which is perfectly distinguishable from the present. In *Underwood v. Wing*, the testator, Mr. Underwood, gave the whole of his property to his wife, and in case she died in his lifetime, then to his children; and on failure of the gift to the children, he gave the property to Mr. Wing. All those gifts, no doubt, failed; but they failed for this reason: because it was not proved that the wife died in the testator's lifetime, and consequently it was not proved that the event had occurred on which the gift was to take place. In that case, the whole series of limitations depended on a contingency, which was not proved to have happened. That case was different from the present, where each limitation is to take effect on the failure of that preceding it.

"I am of opinion in this case, that the plain intention of the testator

was, that his daughter should take an estate for life, and on her death, if she had no children who took a vested interest, the property should go to her next of kin; and that, on the authority of *Jones v. Westcomb*, and several other cases, I must hold that the next of kin of the daughter, at her death, took the fund, and that there was no intestacy."

WOOD *vs.* BELL. 5 Ellis & Bl. 772.

Chattel in Course of Manufacture—Vesting of Property—Contract to Build a Ship.

A special case raised, *inter alia*, a question for the opinion of the Court of Queen's Bench, whether the plaintiff or the defendants, the assignees of Joyce, a bankrupt shipbuilder, were entitled to the property in a certain unfinished iron screw steam-vessel, called the *Britannia*, contracted to be built by Joyce for the plaintiff.

This *Britannia* was, at the time of the bankruptcy, being built under the terms of a contract dated the 3d November, 1853. In July of that year, Joyce, who had built several other steamships, contracted to sell one of them, the *Peninsula*, then in course of construction at his shipbuilding-yard, to the plaintiff. This vessel was completed and paid for, accepted under the contract, and duly registered in the plaintiff's name.

On the 10th September, 1853, the bankrupt, by letter, agreed to build a new steamer according to specifications to be furnished by the plaintiff's agent, for 16,000*l.*, payable as follows: 1,000*l.* on 12th September, 1,000*l.* on 12th November, 1000*l.* on 12th December, and 1,000*l.* on 12th January, 1854; the remaining 12,000*l.* by instalments of 3,000*l.* each; the first on 10th March, provided the vessel was plated and decks laid; the second 3,000*l.* on 10th May, providing the vessel was ready for trial; third 3,000*l.* on 10th August, providing the vessel was according to contract, and properly completed; the fourth and last 3,000*l.* on the 10th October.

In pursuance of this contract, the bankrupt built and completed for the plaintiff a second vessel, afterwards called the *Gibraltar*; and on the 3d November, 1853, whilst this second vessel was in progress, he offered by letter to build for the plaintiff two or more vessels of *the same size and power as the one then in hand, and at the same price, 16,000*l.** This offer was at once accepted by the plaintiff, and an order given for a new vessel, and the vessel now in dispute was at once commenced; nothing was then agreed as to the mode or time of payment. In March, 1854, however,

the bankrupt obtained an advance from the plaintiff of 7,000*l.*, which advance the bankrupt acknowledged by letter, as an advance partly upon the new vessel contracted for, and partly on any other vessel to be thereafter ordered. The letter stipulated for interest being calculated up to such periods as might be agreed on for the instalments becoming payable, and the plaintiff continued up to the time of the bankruptcy, which happened December, 1854, to make advances to the bankrupt to a greater amount than the whole value of the vessels in progress of building for him; the bankrupt giving receipts as for advances on the said vessels. The *Gibraltar* was completely and duly registered in the plaintiff's name; and the vessel now in dispute was treated by the bankrupt throughout as the plaintiff's. She was, at the date of the bankruptcy, plated, or the decks laid, as stipulated for in the case of the *Gibraltar*, but the name of the new vessel, *Britannia*, and the plaintiff's name as owner, were branded upon her.

The Court of Queen's Bench held, on the authority of *Wood v. Russell*, (5 Barnwell & Alderson, 942), and *Clarke v. Spence*, (4 Ad. & E. 468), that the vessel passed to the plaintiff, and this decision was affirmed by the Court of Exchequer Chamber.

MARE vs. CHARLES. 5 Ellis & Bl. 978.

Principal and Agent—Liability of Agent—Purser of Mining Company.

This was an action on a bill drawn by the plaintiffs on the defendant for 102*l.* 0*s.* 6*d.* The bill stated on the face of it that the value received was for machinery supplied the adventurers in Hayter and Holne Moor Mines; but it was directed to the defendant, without describing him as agent or purser. The defendant accepted the bill "for the company," and it appeared that the defendant was purser of the mining company, and not one of the adventurers.

A verdict having been obtained for the plaintiffs, on a rule to enter a nonsuit, the Court of Queen's Bench held that the defendant was personally responsible, as no one but the drawee can accept a bill, unless for honor, and the defendant, by accepting the bill, made himself liable to pay it in the mode in which it was drawn.

Lord Campbell observed, that *Thomas v. Bishop*, (2 Strange, 955), which has been deemed to settle the liability of an agent on a bill drawn on and accepted by him in his own name for value received by his principals, has been uniformly considered good law in this country, though doubted in America.—(Story on Agency, note 3 to sect. 159.)

ORRETT *vs.* CORSER, CORSER *vs.* ORRETT. 21 Beav. 52.

Trust, Breach of—Duty of Bankrupt Trustee to prove for Money due on account of, by himself—Certificate does not remove his Liability.

Sir John Romilly, M. R., decided in this case, that where a trustee indebted to the trust, becomes bankrupt, it is his duty to prove the debt; and if he neglects so to do, he is liable for the loss, notwithstanding he may have obtained his certificate. "Suppose," said his Honor, "a person owing money to a trust estate becomes bankrupt, and the trustee is a distinct and separate person; knowing of the bankruptcy, he is bound to prove the debt; if he does not, he commits a breach of trust, and would be held liable for all that he might have received under the commission, if he had proved the debt, as he ought to have done. Is the case altered because the trustee is himself the debtor? I think not. The original debt is no doubt barred; but the amount of dividends which the trustee might have received under the commission, is a liability subsequently attaching to the trustee in that character, and is not affected by the bankruptcy or the certificate."

SWINFEN *vs.* SWINFEN. 18 Com. B. 485.

Attachment for Disobedience of a Rule of Court—Demand of Performance.

This was an application for an attachment for disobedience of a rule of court requiring the party to execute a conveyance, to carry out certain terms agreed to on the trial of this action. The plaintiff, against whom the application was made, had been merely served with a copy of the rule, and shown the original rule; there was, however, no express demand upon her to do the act which the rule commanded her to do. The Court of Common Pleas, under the circumstances, refused the rule for an attachment. In the course of the discussion, however, it was understood that the court may issue an attachment for disobedience of a rule drawn up on an order of *nisi prius* made at the trial of an issue directed by the Court of Chancery; and that court will not inquire into the authority of counsel to agree to a compromise of the cause at *nisi prius*.

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PROOF OF FOREIGN LAW.

The decision in *Bock vs. Lauman*, 12 Harris, 435, that the court will ascertain and apply foreign law to a case which is governed by it, without the aid of a jury, is worthy of some notice. It is believed that it has been the uniform practice to consider a rule of foreign law a matter of fact, to be ascertained as all other facts *in pais* are ascertained, and if this is to continue, it matters very little whether the tribunal to pass upon the question be the judge or the jury. But if the judge is to determine, the next inquiry must be, how is he to ascertain the fact? Our system makes no provision for the only mode by which this can be done, that is, by the testimony of experts. For how are the jury to give their verdict? Must they wait until the judge has determined his branch of the facts, and if not, when are the two verdicts to be moulded into one, and what is the remedy for an error *in fact*, in this respect; a motion for a new trial or a writ of error, and who is to be responsible for a false verdict? Are the judges, or the authors from whom they derive their information, to be liable for perjury, if they mis-state the fact? or is evidence to be received without any sanction for its truth? But perhaps there is another reason for the old rule. It being confessedly a matter of fact, and to be ascertained by evidence; if the plan adopted in *Bock vs. Lauman*, is to be followed, it is obvious that a man's rights must be decided upon proofs the existence of which he is ignorant of, and which, if presented, he may have the most abundant means of showing are unworthy of

credit. It has always been supposed, that the submitting evidence to the discussions of counsel before their effect is determined upon, and the right to know what is the evidence upon which one's rights are to be adjudged, with an opportunity to discuss it, are among the best methods of arriving at the truth; neither of these things are possible any longer. And further, how the rule is to be applied in error, it is difficult to understand. Is the court to reverse for error in fact, or re-try upon new evidence, or are they confined to the evidence submitted in the court below?

These considerations, and they are but a few of the more obvious, may make it worth while to consider whether there has not been some misunderstanding either of the rule or its application in practice.

Now if it be true that the proper mode of trying a question of foreign law, that is, the fact, what is the rule of conduct in another country upon a particular state of facts—is to read to a jury, codes, statutes, or the reports of decided cases—certainly the common law, which is generally thought to be eminently practical, has here fallen into a gross blunder. For can any thing be more absurd than to throw upon men, incompetent to express an opinion on a question arising under the law of their own country, the decision of the same question under that of another. But is this the proper way? Is it the form in which analogous cases are tried? If a question arises under the patent law, for instance, involving the results, either of a refined mathematical calculation or the law of chemical affinities, has it been hitherto thought necessary to instruct the jury in the elements of mathematical or chemical science? or does the occult nature of the fact authorize the judge to assume the province of the jury? Do we not rather resort to the testimony or opinions of experts on the *exact point* or question of fact in issue? Precisely so with foreign law, if our rule is but understood. And infinitely greater is the necessity for this mode of dealing with the question. For unlike laws of science, there is in regard to municipal law, a traditionary law or practice with which the readers and hearers are assumed to be familiar, and without which an attempt practically to apply the commands of a statute or the directions of a judge, would most frequently lead to gross absurdity. It is almost

impossible fully to appreciate the difficulty which arises out of this element in dealing with a question of law not of the country in which we live ; and besides a law of science is not liable to be repealed or overruled, which sometimes occurs in municipal law.

For such reasons as these, doubtless, it was that the English law declared the existence of a rule of foreign law to belong to the province of the jury, because it must be proven by experts, speaking—not to the abstract question, nor assigning reasons for the rule, but simply swearing to the existence of a rule, if there be one. Thus we find in *Cocks vs. Purday*, 2 C. & K. 269, that the expert must state the law upon his responsibility, and should not be permitted to read scraps of a code ; and in *Baron De Bodes' case*, 8 Q. B. 208, the jurist was permitted to state the law of his country, though enacted in a code, without producing a copy. Thus reversing a rule of evidence, universal, when the meaning of a writing is to be ascertained, because, *the point was not what the code said, nor even what it meant*—but what was the rule of law which had been deduced by the courts and community from that code. The language of Lord Denman is : “Properly speaking, the nature of such evidence is not to set forth the contents of the written law, but its *effect*, and the state of the law resulting from it. *The mere contents, indeed, might often mislead persons not familiar with the particular system of law. The witness is called upon to state what law does result from the instrument.*” Coleridge, J.’s remarks on pp. 265–6, are not the less pointed and conclusive.

Surely this is not remarkable when we look at our own law. What a figure a foreigner would present, to be sure, who would undertake to advise a course of action guided by our statutes, even when aided by our reports. What foreigner could pretend to certainty in not having overlooked some later statute or an unpublished decision. An instance or two, which accident has thrown in our way, may illustrate the result of these attempts at universality.

Thus, for instance, no less a person than Geo. Jos. Bell, professor of the law of Scotland, in the University of Edinburgh, in his *Contract of Sale*, p. 59, says, “on the proof of sale (of chattels) by the law of America :” “The law of the United States of America, in this matter, is grounded on the law of England, and has, indeed,

been settled nearly on a footing of the English statute of frauds as applicable to all contracts for the sale of goods or chattels for the price of \$50 or more." "The statute of frauds as thus adopted in America, has, a few years ago, been reconstructed by the legislature of New York, and the rules as so fixed, are proclaimed in the revised statutes." Then laying down the rule as it formerly stood under "the American statute of frauds," as settled by some decisions, the references to which are either misprinted or impossible, probably meaning those of Maryland, he proceeds to show the changes effected in the American statute by the *revised American statute*.

Now, our ten fingers would scarce serve to count the blunders in these two pages. So gross that a witness stating the law in this wise would be convicted of perjury. Yet why should Pennsylvania judges suppose that in examining questions of foreign law they are more likely to be right than this learned professor? Are they better trained? Have they better sources of information? The clear and elegant treatise of Kent has thus been honestly converted into nonsense by an excellent and learned jurist, simply because he assumed he knew what he was utterly ignorant of, the *practical law* of another State.

Even in a case much nearer home, and where the court was exercising a jurisdiction which required them to administer our law, and in which the decision was undoubtedly right, we see a judge clearly of the opinion that every thing done in the Common Pleas under an assignee's account, if that was filed voluntarily, is *coram non iudice*, *Shelby vs. Bacon*, 10 How. 68. It would be difficult to find a Pennsylvania lawyer who could be brought to doubt whether any distinction exists between such a case, and one commenced by citation and attachment. Yet evidently the learned judge of the Supreme Court of the United States, was entirely unaware both of our rules of practice and procedure, and of the effect which attaches to a proceeding upon which millions of property have depended.

No case can be stronger than occurred in *Wildes vs. Savage*, 1 Story, 22. The question was, whether a letter promising to accept a particular bill of exchange, could be, by the law of England, treated as an acceptance by a person to whom the letter was not ad-

dressed. Lord Mansfield and his associates had twice decided that it could. Mr. Justice Story and the Supreme Court of the United States had followed suit, and it was confessed that those decisions of the King's Bench had never been overruled. Yet it appeared on the oaths of such men as Pollock and Hill, that this was no longer the law, and indeed never had been law but during Mansfield's presidency, and the fact was decided accordingly.

What would have been the effect of Mr. Justice Story attempting to ascertain from books the law of England, on a subject that he probably deemed himself as well informed on as any English judge? Why merely to make a man liable under a contract which by the law of the land never existed. So in a case of the greatest practical importance, the right of a pledgee to tack a subsequent advance, the same learned judge, 2 Story's Equity, sec. 1034, evidently laying down the English rule, for eighteen English decisions and but one American are cited, is so wide of the mark, that when the point really came up for discussion in *Chilton vs. Carrington*, 15 Com. Bench, 102, counsel familiar with their municipal law could not cite one of his eighteen authorities in support of the proposition, nor would the court hear an argument against the alleged rule, so utterly was it without foundation in their law.

When, therefore, we find, that even such a writer as Kent cannot make himself sufficiently clear to a Scotch jurist, to enable him to give an outline of the American law not absolute nonsense, and that so anxious a seeker for English law as Mr. Justice Story, should have fallen into such palpable blunders on such apparently plain and practical questions, it really seems that it would be safer to proceed in the old way of ascertaining *facts*, by inquiring of competent witnesses under oath, rather than trust to the chance of the judge's knowledge, either acquired or intuitive.

LIABILITY OF AGENT OF KNOWN PRINCIPAL.

It seems curious that the liability of an agent on contracts entered into by him on behalf of a known principal should be so often a matter of doubt as it is. Contracts of this sort are of every day occurrence, and it may be assumed the agent knows whether he

intends to pledge himself personally or not; yet every term cases arise in which the effect of the agreement is as much disputed as if there could be no certainty in the meaning of English words. A review of the recent cases upon this point may therefore be of some practical interest.

There never was any doubt, that where an agent contracts in his own name, without stating that he has a principal, or without disclosing the name of his principal, the other party to the contract might hold him personally liable. 2 Smith's L. C. 223; *Franklyn vs. Lamond*, 4 C. B. 637. The rule has even gone further; for where a party on the face of the agreement said that he contracted as agent for the freighter, (*not naming him*), and stipulated, that "the agreement being concluded on behalf of another party, all responsibility on his part should cease on the cargo being shipped," it was held, that when he turned out to be really the principal he might be treated as such, because the limitation only applied to him in his character as agent, and it involved no contradiction of the written document to suppose that he might contract as agent for the freighter, whoever that freighter might be, and might still adopt the character of freighter himself if he chose. *Schmalz vs. Avery*, 16 Q. B. 655. But in such a case it rests on the party who wishes to fix him with personal liability to negative the assertion that he is agent. Therefore, where on a similar form of agreement, the evidence failed to prove that the defendant was principal, it was held that he was not responsible. *Carr vs. Jackson*, 7 Exch. 382.

There is much greater difficulty, however, where the party not only states that he is an agent, but mentions the name of his principal. The cases upon this point may be divided into two classes—first, those in which the professing agent had no authority to bind his assumed principal; and, secondly, those in which he had.

On the first state of facts the following rules may be laid down: Where the agent has contracted on the faith of an authority which once existed, but which has ceased, and of whose cessation he has no means of knowledge, he is not liable. The well known case of *Smout vs. Ilberry*, 10 M. & W. 1, settled that point. On the other hand, he will be personally responsible where he never had any authority; and in such a case it makes no difference whether he

fraudulently misrepresented his authority with intent to deceive, or without fraud, assumed an authority which he did not know to exist, or even acted upon authority which he bona fide believed to be vested in him, as in the case of agents acting upon forged warrants of attorney which are supposed to be genuine. Per Cur., 10 M. & W. 9, 10. And then the further question arises, how is the agent, when liable, to be sued? A dictum of Bayley, B., is reported, (2 Cr. & M. 530, note *a*,) to the effect, that in such case the agent may be sued on the contract; and so it is held in some of the States of America. Story on Agency 226. But this doctrine was impliedly denied in *Polhill vs. Walter*, 3 B. & Ad. 114, and has been directly overruled in later cases. It is now laid down, that where it clearly and expressly appears that a person, really acting as agent, contracts as such agent in the name of his principal, professing and intending to bind his principal only, he cannot himself be sued upon the contract as if he were a party to the instrument; though it would be different if, though professing to be agent, he were in fact the principal. *Jenkins vs. Hutchinson*, 13 Q. B. 744; *Lewis vs. Nicholson*, 21 L. J., Q. B. 311. The remedy against an agent, who contracts as such without authority, may be either by an action on the case for a false representation of authority, or by an action on an implied contract for the existence of the authority which he professes to have. But to say that he is personally liable upon a contract which he really makes as agent would be to make a contract, instead of construing that which the parties themselves have made. *Lewis vs. Nicholson*, *ubi sup*.

Some of the decisions upon bills of exchange illustrate this doctrine. In *Polhill vs. Walter*, before referred to, the defendant accepted a bill by procuration of the drawee, believing that the latter would sanction his act, which he did not. It was held that he could not be sued upon the acceptance, as no one could be liable as acceptor but the person to whom the bill is addressed, unless he be an acceptor for honor. Two later cases, apparently at variance, are not really so. In one a bill was directed to "The A. C. Mining Co.," and was accepted "For the A. C. Mining Co., W. Van Uster, manager." *Owen vs. Van Uster*, 10 C. B. 318. In the other, the bill was addressed to "J. D., purser, W. D. Mining Co.," and

accepted by him in the terms, "J. D., accepted per proc. W. D. Mining Co." *Nicholls vs. Diamond*, 9 Exch. 154. In neither case was the acceptor authorized to accept, and in both he was held liable; but this was on the express ground, that as in both cases he was a member of the company, his acceptance, was in fact, an undertaking on his own behalf and that of others. He could not bind the others, but he was not the less bound himself. It was admitted that were it not for this fact he would not be responsible as a party to the bill.

The second state of things, however, is much more common—that, namely, in which the agent is really authorized to contract, but does so in such a manner that a claim is set up against him individually. "In this, as in all similar cases, whether the agent contracted as agent or not is a question of fact, and not a conclusion of law. Each case must depend on its own circumstances." Per Willes, J., in *Green vs. Kopke*, 2 Jur., N. S. part 1, p. 1050. It may, however, be possible to deduce some general principles from the decisions on this subject.

In the first place, a party who contracts in his own name by seal will always be liable, though he states that he contracts on behalf of another, *Appleton vs. Binks*, 5 East, 148, because no one can be sued upon the covenant but himself. But even where the contract is not under seal, the agent will not be secured by stating in the body of the agreement that he contracts on behalf of, or as solicitor of, a third party, if he signs simply in his own name. "Prima facie, a party who signs his own name must be taken as the contracting party, unless there is something very strong in the contract to release him. Per Cresswell, J., in *Cooke vs. Wilson*, 2 Jur., N. S. part 1, p. 1095; *Burrell vs. Jones*, 3 B. & Al. 47. And the inference of personal liability will be rendered irresistible if the contract contains some stipulations which are to be performed by the defendant individually; *Taner vs. Christian*, 4 El. & Bl. 591, *Cooke vs. Wilson*, ubi sup., or if it is so framed that the supposed principals are not bound by it, so that there would be no remedy against any one if the agents are not liable. *Wilson vs. Zuleta*, 14 Q. B. 405. On the other hand, even where a contract, expressed to be made on behalf of another, was signed by the defend-

ant in his own name, he was held not to be personally bound, where the act stipulated for could only be done by his principal, *Lewis vs. Nicholson*, 21 L. J., Q. B. 311, and where, upon the whole contract, coupled with the previous negotiations, it appeared to be the understanding of the parties that he only entered into the undertaking as agent. *Downman vs. Williams*, 7 Q. B. 103.

It is in general conclusive in favor of the defendant, that he has signed per procuration, or on behalf of, or as agent for, the professed principal. Per Cresswell, J., in *Cooke vs. Wilson*, ubi sup.; *Ex parte Buckley*, 14 M. & W. 469; *Jenkins vs. Hutchinson*, 13 Q. B. 744. And in such a case it makes no difference that the principal is a foreigner residing abroad. The question is still one of intention, to be gathered from the circumstances appearing on the contract; and although, where the seller deals with an agent resident in the country, and acting for a foreign principal, the presumption is that the seller does not contract with the foreigner, and trust him, but with the party with whom he makes the bargain, still this is a presumption of law and not of fact, and cannot be set up against the plain words of the contract. *Green vs. Kopke*, 2 Jur., N. S., part 1, p. 1049; *Mahony vs. Kekulé*, 14 C. B. 390.

Even in the last-named case, however, the defendant will be treated as principal, if it would be a contradiction of the entire agreement to treat him as agent. A charter party stated to be made between the plaintiffs and defendants, went on in the usual way, without any intimation that the defendants were not the principals, till at the end it was signed by them, "by authority of and as agents for, S. of Memel." They were held personally liable. Lord Campbell, C. J. and Coleridge, J. seemed to attach a different degree of weight to the fact that the alleged principals were foreigners. Both agreed that as the defendants were contracting parties, by whom it was agreed that every thing was to be done, they were personally bound and that the concluding words were only intended for their security, as between themselves and S. *Lennard vs. Fleming*, 5 El. & Bl. 125. And so, where a bill of exchange was stated to be for goods supplied to the adventurers of the H. mines, and was addressed to the defendant, and accepted by him, "For the companies, W. Charles, purser," it was held that he was

personally liable as acceptor. The court pointed out that the bill was addressed to him individually, and if not accepted by him individually, was not accepted at all. There was nothing like a disclaimer of personal liability, as might have been the case if the words "per proc." had been used; and the statement as to consideration merely showed that the company were the parties ultimately indebted. *Mare vs. Charles*, 25 L. J. Q. B. 119.¹

RECENT AMERICAN DECISIONS.

In the Circuit Court of the United States for the Southern District of Ohio—May Term, 1855.

EBEN B. WARD ET AL. vs. PHILO CHAMBERLAIN ET AL.

1. When two vessels are approaching each other, and the character and course of either cannot be determined by the watch on board, such vessel should be stopped, or slowed, until the course of the approaching vessel be ascertained, whether it be a sail or a steam vessel.
2. Some of the rules of the Trinity masters, intended to apply in navigating a river, when applied to the open sea, are more likely to produce collisions than to avoid them.
3. In certain conditions, one vessel is to keep her course, and the other to avoid her; how can a concurrence of judgment as to their position, by their respective masters, be expected, so as to comply with the rule of right, when the wind is fresh? Uncertainty in this respect produces many collisions.
4. All the rules of navigation should be simple and easily understood.
5. Complicated rules are often misunderstood, and more frequently applied to facts supposed, which have no existence.
6. So far as my limited experience on this subject enables me to speak, the rules of navigation recognized, instead of insuring safety, have greatly increased the number of collisions. Per McLEAN, J.
7. If the rule were, that all vessels meeting each other should turn to the right, all would understand it, and collisions would be avoided. Each vessel, in such case, would know the course of the other; and if either could not turn as directed, it would not run in the path of the other. I am aware that this is too simple and too easily understood for technical lawyers, on the bench or at the bar. It is the rule on every turnpike road, and such maxims are always founded on common sense. Per McLEAN, J.
8. When fault may be attributed to two vessels, the damages are divided, and not apportioned according to the degree of fault.

Emmons, Swayne & Newberry, for libellants.

Spalding & Stanberry, for respondents.

¹ 20 Lond. Jurist, 489.

The opinion of the court was delivered by

McLEAN, J.—This is an appeal in admiralty. The libellants allege they were the owners of the steamboat *Atlantic*, which was engaged in the transportation of passengers and freight between the port of Buffalo, New York, and that of Detroit, Michigan; that on the 19th of August, 1852, in the evening, she left Buffalo for Detroit with freight and a large number of passengers; that at half-past two o'clock on the morning of the 20th August, being on her usual course off Long Point, on the Canada shore, the propellor *Ogdensburgh*, of which Robert Richardson was master, then being on her way from Cleveland to the entrance of the Welland canal, run into the *Atlantic* with great force, the bow of the propeller striking the larboard side of the *Atlantic* near the forward gangway, which opened her side, so that in a short time she sunk in about twenty-five fathoms water.

The respondents say, in their answer, that on the 19th of August, 1852, the *Ogdensburgh*, being heavily laden, left the port of Cleveland, between twelve and one o'clock, and proceeded down the lake by Fairport, in Ohio, towards her port of destination, *Ogdensburgh*, New York, through the Welland Canal, in Canada. That at about two o'clock on the morning of the next day, the propeller being on her correct course, northeast by east, the wind being light from the southwest, and the weather somewhat hazy, the watch on her deck discovered a steamboat light, from two to three points on the propeller's starboard bow, at the distance, as was supposed, of about three miles. The propeller was running about seven miles an hour; her second mate being on watch, perceived the light was nearing him rapidly, and he gave the signal to slow; and seeing the light continued to near him, he then made the signal to stop the engine, and immediately afterward to reverse it; but, notwithstanding these precautions, a collision ensued.

The true course of the *Atlantic*, is alleged in the answer, to have been, for Detroit, southwest by west, which, if pursued from the time her light was discovered, would have taken them near a mile south of the propeller.

The evidence is voluminous on both sides. This, if not required,

is justified by the amount in controversy; and especially by the deplorable consequences of the collision, which caused the loss of some one hundred and forty persons.

Omitting matters in detail and incidental, the evidence of the libellant makes the following case: The Atlantic was a staunch steamer of the first class, of a capacity to carry upwards of eight hundred tons, with an engine of a thousand horse power. She had her complement of officers and men, with her lights brightly burning. At the usual time of departure, between nine and ten o'clock at night, she left Buffalo for Detroit, loaded with freight, and more than five hundred passengers. In performing her two weekly trips between Buffalo and Detroit, the course of the Atlantic was usually southwest by west, and she was steered that course on the night of the collision. It was a starlight night, the wind being slight, but a haze rested upon the lake, which extended upwards some twenty or thirty feet. The lights of a vessel could be seen some five or six miles.

The course of the Atlantic lay near Long Point, which projects into the lake on the Canada side, on the point of which there is a light house, and which is some sixty or seventy miles from Buffalo. After making Long Point, the Atlantic was some fifteen or twenty minutes in running abreast of it, her course being changed one-fourth of a point to the southward. At this place the former course of southwest by west was resumed. The officer of the deck, the second mate, occupied no particular place, but was on the top of the promenade deck, in the pilot house not to exceed one or two minutes, on the top of it, on the hurricane deck, sometimes on the starboard or larboard of the promenade deck.

While standing in the pilot-house, the light of the propeller was made; one light was at first seen, then another, both having the appearance of glimmering stars. They were made on the larboard bow of the Atlantic, bearing three-fourths of a point. They were supposed to be lights on a sail vessel. At this time, the signal lights of the steamer were burning brightly. On seeing the lights of the approaching vessel, the helmsman of the Atlantic was ordered to port her wheel, which was done. Shortly after, from the top of

the pilot-house, the lights discovered were observed to be nearing the Atlantic, and, in fact, were close to her. The wheel of the Atlantic was then ordered hard a-port. From the top of the pilot-house, and not before, the approaching vessel, by the reflected lights of the Atlantic, was discovered to be a propeller. It was then too late to stop the steamer, and the only chance of escape, as supposed by the deck officer, was to let her go ahead. The signal lights of the propeller were looked for, but not seen. The propeller struck the steamer on the larboard side, which penetrated into the main hatch and below the water line, through which the water gushed into the Atlantic, and in one or two minutes her bow sunk, and the fires were extinguished. The stern remained above the water until sunrise the next morning.

The respondents' case, as shown by the evidence on their part, is, the propeller left Cleveland, the 19th of August, 1852; was kept down the lake near the shore to Grand river, and continued from that place east-north-east until two o'clock, when she was hauled off north-east by east. Soon after this change, a light was observed on the propeller, two or two and one-half points on her starboard bow; and the helmsman was directed to keep her on her course. The light was supposed to be at a distance of three miles. The light approached the propeller, but did not appear to cross her path. In two or three minutes, the bell was rung to slow the engine, and in six minutes, more or less, the engine was stopped and reversed. Seeing that a collision was inevitable, the wheel was then put hard a-starboard, with the view to break the force of the blow. By the oaths of the captain, mate and helmsman of the propeller, at the time of the collision, her signal and other lights were burning brightly. The same witnesses say, that by the stoppage and reversal of the engine, the force of the propeller was reduced to some three miles an hour, at the time she struck the Atlantic.

It is important to ascertain the position and course of the vessel, immediately before the collision. A map of Lake Erie, made on actual survey, by the bureau of Topographical Engineers of the United States, was used on the trial, on which was marked the courses as proved to have been run by the respective vessels, from

Buffalo and Cleveland, up to the time of the collision. This map is presumed to be accurate.

McNatt, the mate of the propeller, says his watch commenced at twelve o'clock at night, and that he kept the propeller east-north-east, until two o'clock, and then hauled off from the southern shore of the lake, north-east by east, and that soon after this change, the lights of the Atlantic appeared. If McNatt, as he swears, from twelve o'clock to two, steered the propeller the course she had run, east-north-east, and then changed to north-east by east, he would not have passed within ten miles of the place of collision. From the statement of Captain Richardson, the collision took place some four or five miles west by south of Long Point, the Atlantic having passed within about four miles of the light-house. This is only important as showing the inaccuracy of the statements of Captain Richardson and his mate, McNatt, as to the course of the propeller; and that, when she struck the Atlantic, her course was from the southern shore of the lake, at an angle with the course of the Atlantic, which must have made the larboard lights of the Atlantic, on the starboard bow of the propeller. As the vessels approached each other, on the above hypothesis, the lights would become less perceptible, and to a person on the deck of the propeller, the Atlantic would seem to be heading on to her. This supposition is sustained by the evidence in the case, and by the declarations of McNatt, that his course crossed the path of the Atlantic.

The lights of the propeller, except the signal lights, were made on the larboard bow of the Atlantic, and the larboard lights of the Atlantic, including the red light, were made on the starboard bow of the propeller. The course of the Atlantic was south-west by west, that of the propeller, as stated by McNatt, was north-east by east. Now, if the propeller had been running this line, north of the line of the Atlantic, the lights of the propeller could not be made on the larboard bow of the Atlantic. It will be recollected that the lights of both vessels, as at first seen, continued to be displayed, until the moment before the collision. The Atlantic was running westerly, the propeller easterly, it is alleged, on parallel lines: now, without a reversal of the order of nature, on this hypo-

thesis, the starboard lights of the propeller could not be displayed on the larboard bow of the Atlantic, nor could the larboard lights of the Atlantic be made on the starboard bow of the propeller. This sufficiently demonstrates the error of the respondents, in assuming that the propeller, when the larboard lights of the Atlantic were made on her starboard bow, was north of the Atlantic. And this is the position taken in the argument.

The hypothesis that the propeller was approaching the path of the Atlantic, from the south, by an angle which displayed the light of the propeller to the larboard bow of the Atlantic, and caused her larboard lights to shine on the starboard bow of the propeller, is consistent with the evidence in the case; and the demonstration above stated, is conclusive of the fact. It seems to be clear, from the facts stated, that McNatt intended to pass the bow of the Atlantic. But this does not rest upon inference alone; McNatt repeatedly declared, at different times, in explanation of the collision, and immediately after its occurrence, that he did intend to pass the bow of the Atlantic; and that he would have accomplished his purpose had not that vessel ported her wheel. These remarks were made at different times and occasions, as shown by some fifteen or twenty witnesses. Whether the declarations of McNatt, thus proved, be considered as evidence in chief, or as discrediting the witness, the result, under the facts, must be the same.

If these declarations of McNatt be true, and on one occasion he verified their truth by an oath, no one can doubt that the propeller was south of the line of the Atlantic. Could McNatt wish to pass the bow of a vessel behind him? This determination to cross the path of the Atlantic was carried so far as to render the collision inevitable. Until this was perceived by McNatt, to use his own words, he did not apprehend danger.

The right to keep his course was, probably, an afterthought with McNatt. Seeing the terrible result of his act, it was natural for him to seek some palliation or excuse. The fact was attributed to the Atlantic in porting her helm; but he had a right to keep on his course. This right he has no doubt claimed from a rule in navigation which, under certain circumstances, allows one of two vessels

meeting each other, to keep on her course, while the other is required to give way. This rule is more calculated to cause collisions than to avoid them. Is a concurrence of judgment to be expected in the masters of two vessels approaching each other, as to the conditions prescribed, even in daylight, and especially at night? A rule of navigation, to be effectual, must be simple and positive. It should be liable to no exceptions. It should be so plain that any man who knows his right hand from his left, can follow it. "Where two vessels approach each other in opposite directions, each should turn to the right." Let this be observed and there will be no collisions. The rule should apply indiscriminately to all vessels, whether propelled by wind or steam. And if it should happen that one vessel is unable to turn to the right, the other vessel will never doubt as to its course, if practicable, and that will be sufficient to avoid her.

Although the officers of the propeller saw the steamer at the distance of three miles, and from her lights knew her character, the propeller kept on her course; when the vessels approached each other very near, an order was given to slow the propeller, to stop the engine, and then to reverse it, which McNatt swears broke the force of her blow, as she could not have been moving more than at the rate of three or four miles an hour; but on other occasions, it is proved he said these measures were taken so short a time before the collision, as not materially to lessen the force of her movement. And this would seem to be the fact from the wound inflicted on the Atlantic. It is true the helm of the propeller was starboarded, when the vessels were nearly in contact, which was done, as McNatt states, not to avoid a collision, but to render the conflict less injurious by a slanting blow.

It is argued that the propeller, under existing circumstances, was bound to keep her course. That to have thrown her helm a-port, while the Atlantic was from two to three points on her starboard bow, would have been a gross violation of the rules of navigation; and several experts have given their opinion approving of the course of McNatt.

These opinions were given and the usage stated, on the hypothesis that the boats were running on parallel lines, that of the Atlantic

being south of the propeller's. This supposition is shown to be incorrect from the fact that the red light of the Atlantic was seen on the starboard bow of the propeller, and the lights of the propeller made three-fourths of a point on the larboard bow of the Atlantic. This would be impossible if the propeller were running on a parallel line with the Atlantic. That the lights were seen as stated, no one can doubt, as the witnesses on both boats concur.

The captain of the propeller seems to differ from his experts and the counsel. When he met McNatt on the deck, after the collision, he inquired of him if he saw the red light of the steamer, and being answered that he did, with great emphasis, the captain said, "why did you not port?" The Captain knew, as McNatt afterwardss wore, that the propeller's line was from the southern shore of the lake, and that it lay across the path of the Atlantic.

The libel charges that the propeller had not her signal lights burning, and displayed as the law requires. That the deck officer of the Atlantic supposed the lights were on a sail vessel, and that he was warranted in so judging, and in running the Atlantic, Carney, the watch on the Atlantic, Brigham, an experienced seaman, who was a passenger, Rose, a fireman, Barry, the wheelman, all on board the Atlantic, and all of whom saw the approach of the propeller until she struck the Atlantic, and they all looked for signal lights, and saw none on the propeller.

Warner, respondent's witness, was on board the Atlantic; saw a white light at about 2 o'clock, or after, one point over her larboard bow; thought it was a sail vessel; when the vessels were within fifty feet of each other he then, for the first time, saw a signal light, he thinks, but is not certain. But, Wells, McPherson, Barnes, Kenedy, Welsh, Meeler and McGrain, all hands on board of the propeller, and Mr. and Mrs. Ring, passengers on that boat, concur in saying the signal lights were nearly out, and could not be seen more than a few rods.

It is true that McNatt and Captain Richardson swear that the signal lights were burning at the time of the collision, and continued to burn until the propeller landed at Erie. But the facts sworn to by these witnesses are disproved by so great a number, as to leave

no doubt that the signal lights were so nearly extinguished, as not to be seen further than one or two lengths of the vessel. McGrain, whose duty it was to trim the lamps, after the collision, when he came on deck, the captain ordered him to trim that light, pointing to the signal light. The witness brushed off the scum or hard crust that was on the top of the wick of the light, picked it and put it back in its place. One of the tubes of this signal light was entirely out. The light could not be seen, McGrain says, but little further than the length of the boat. The signal lights, unless trimmed by twelve o'clock at night, he says, would not afford a light more than twice the length of the vessel. They were not trimmed on the night of the collision, until after it occurred.

Several of the witnesses saw these lamps burning after they were trimmed. As two white lights were shown by the propeller, it is argued that the officer of the deck of the Atlantic might have known they were not carried by a sail vessel. But it is proved that many sail vessels carry two white lights; and it is clear, that no number of white lights can excuse the want of colored lights which the law requires every steamer to carry.

On two grounds the propeller is clearly chargeable with fault. First, when she saw the light of the Atlantic she should have ported her helm, instead of continuing her course. The assumption that she was north of the line of the Atlantic is not sustained by the evidence, and is contradicted by the declarations of McNatt, by the lights made on the bows of both vessels, which showed the supposition was unfounded, and could not, in the nature of things, be true. No doubt is entertained that the display of lights is accounted for by the angle at which the vessels approached each other, and which is the only hypothesis sustained by the evidence. Had the propeller ported her wheel, and put it hard-a-port, there would have been no collision. This would have caused the propeller to pass the stern of the Atlantic. McNatt was either ignorant of his duty or perversely wrong, in continuing his course, and especially in his attempt to pass the bow of the Atlantic. There is no rule of navigation which sustains him, but the contrary. And to this act of his, more than any other, is the sad calamity to be attributed.

In the case of the *Ann & Mary*, 9 English Admiralty Rep. 195, the Trinity masters say—"We beg to observe to this court, that the golden rule so long established, must be strictly adhered to; it is this, that the larboard tack is to give way, and the vessel on the starboard tack to hold on." This rule when applied to the open sea is pregnant with danger, as above observed. It is salutary, no doubt, when applied in a narrow river, where its shores show the position and course of each vessel. But the masters say, "and the new rule which has been lately made for steam vessels, namely, each to put the helm a-port under all doubtful circumstances." This rule is founded on common sense and common prudence. It was disregarded by the propeller.

But in the second place, the propeller was chargeable with fault, in not having her signal lights in order. These lights, it is true, to some extent were burning. They were not entirely out, but, for all practical purposes, they might as well have been extinguished. They were so low, and so encrusted by the atmosphere, that they could not be seen scarcely twice the length of the boat. It is true the mate on deck, the captain, and one or two others, swear those lights were burning at the time of the collision. After the collision, the captain directed McGrain to fix this or these lights. He saw the defects, and this order shows it; and it is proved by so many persons on both boats, and especially by those on board the *Atlantic*, who were experienced sailors, and who looked for the signal lights as the propeller approached but did not see them, that the force of the evidence is irresistible. One witness only on the *Atlantic* thought he saw one of those lights at the time of the collision, but is not certain. Until Carney saw the hull of the propeller on her near approach, by the reflected lights of the *Atlantic*, he supposed the white lights seen were carried by a sail vessel. Had he been warned by the signal lights that the approaching vessel was a steamer, Carney says he would have stopped his vessel. Defective signal lights, which would not enable an approaching vessel to see them at such a distance as to avoid a collision, are not lights within the law. And this was the condition of the propeller's signal lights

at the time of the collision. The second ground of fault, in my judgment, is as clearly established as the first one.

But was the management of the Atlantic faultless? I think it was not. The objection that the captain, instead of standing his watch, substituted the second mate, and retired to rest, and was not seen on deck again until roused by the collision, is not in itself a fault. In this Captain Pettys, master of the Atlantic, did nothing more than was usually done by masters of steamers when the night is clear and calm. The second mate, under such circumstances, is often ordered to the deck. The assertion that the second mate was incompetent to the duties assigned him, is disproved by a great number of experts, which relieves the second mate from any just imputation of ignorance or want of energy.

The Atlantic had in her charge about five hundred passengers. This imposed upon the officer in command awful responsibilities. It should have quickened his solicitude and energy in the discharge of his duties. When he first descried the approaching vessel he put his helm a-port, and a moment before the contact he ordered it hard-a-port. Seeing only the white lights, he supposed the vessel carrying them to be a sail vessel. No signal lights indicating it to be a propeller were seen by him until after the collision, and after the signal lights had been trimmed.

The experts called by the libellant say that the Atlantic was very properly kept on her way without any abatement of her speed. They were right, probably, on the supposition that the propeller had been a sail vessel. From the slow progress of such a vessel, the steamer in all probability would have passed her without danger. But had the mate a right to presume the approaching light to be on a sail vessel, and to act accordingly? Technically, perhaps, he had. But could there be no doubt as to the character of the approaching vessel? Had Carney a right to hazard the safety of his passengers on the faithful conduct of the master of the vessel in view? The lives of the passengers were ventured on the Atlantic on the character of the vessel, and the skill and efficiency of its officers. A trust was reposed in them, and not on the good conduct or skill of the officers of such vessels as they might meet.

Under such circumstances, it is not enough for an officer to be within the rules of navigation so as to charge the wrong on the colliding vessel. Notwithstanding this wrong in an approaching vessel, the peril must be seen and guarded against, by an exercise of skill and firmness which, under such an emergency, might reasonably be expected from competent officers.

Prudence required, when the lights of the propeller were seen, that the Atlantic's helm should be ported, and the course of the approaching vessel ascertained; and if this could not be done except by slowing or stopping her engine, the boat should be checked or stopped. It is true that a steamer, by the present rules of navigation, may take either the larboard or starboard side of the sail vessel. This leads to many collisions, as the sail vessel may mistake the intentions of the steamer, and run across her path; but if each had to pass the other on the right, there could be no mistake.

In *St. John v. Paine*, 10 Howard, 557, speaking of the Trinity rules, the court say: "These rules have their exceptions in extreme cases, depending upon the special circumstances of the case, and in respect to which no general rule can be laid down or applied. Either vessel may find herself in a position, at the time when it would be impossible to conform to them without certain peril. These cannot be anticipated, and therefore cannot be provided for by any fixed regulation. They can only be examined, and the management of the vessel approved or condemned, as the case may arise." And again in *Peck v. Sanderson*, 17 Howard, 178, the court say: "Neither can the order to stop the engine and back, instead of changing the course of the steamship, be regarded as a fault. It would evidently have been unwise to change the course until the course of the approaching vessel was ascertained. She might be approaching at an angle that would clear the steamship, and a change in the course of the latter might produce a collision, instead of preventing it."

Carney admitted, that if he had known the approaching vessel was a propeller, he would have stopped the engine. For the safety of his boat and passengers, it was important that he should know the character of the vessel and her course. But he did not stop to

ascertain either. He judged of the one by the light which appeared, and of the other, from the light made on his starboard bow. But he erred in both cases. The approaching boat was running at an angle to the line of the Atlantic, and, in such case, porting his helm and then hard-a-port would not, and did not, avoid her.

The commander of a boat has no right to incur any risk which jeopardizes the lives of his passengers, and which he may avoid. Had the engine of the Atlantic been slowed two minutes, there would have been no collision. The experts sustain Carney in keeping the Atlantic at full speed on her course. The opinions of experienced seamen may be relied on, where there is no mistake in the facts on which it is founded. They judged, in the present case from the lights made on the larboard bow of the Atlantic, not knowing whether the light so made was from the starboard or larboard light of the approaching vessel. The fact proved that the larboard lights of the Atlantic were made on the starboard bow of the propellor, which showed that the course of the propellor crossed the path of the Atlantic; and in such a case no prudent man could advise the Atlantic to keep her course and speed. Under such circumstances a collision was certain, if the vessels should meet at the point where the propeller's line crossed that of the Atlantic. When lights are made, it is always difficult, and often impossible, to tell the course of the approaching vessel; and until this shall be ascertained, the vessels should stop their engines. Where the vessels are approaching each other at an angle, whether they will meet at the angle depends upon the relative distances and speed of the boats, which no one can calculate or determine. Under such circumstances, there is no safety but in the stoppage and reversal of the engines. When vessels are approaching each other in parallel lines, or in the same lines, the helm of each should be ported.

On the approach of danger, every officer should be called to the deck, and the master, to whom the vessel is chiefly entrusted, should take the command. I am aware that this has not been required; and I am also aware that the destruction of human life has become so common from collisions of steamboats, that the country look upon them as ordinary occurrences. The Atlantic cannot be held fault-

less, as the measures dictated by prudence and necessity were not taken to avoid the collision.

There is evidence in the case tending to show the most reprehensible and inhuman conduct of Captain Pettys, of the Atlantic, after the collision. This has been explained, or contradicted, by other testimony. He is charged with calling, when in the life-boat of the Atlantic, on the boat of the propeller to come and take him on that boat, as he was Captain Pettys, of the Atlantic. It seems Captain Pettys was in the boat, but that it was not he, but another person, in the same boat, who made the request. It is also stated that, when on board the propeller, he advised Captain Richardson not to go to the wreck of the Atlantic with the propeller, as the passengers were so numerous as to sink her. It is said by other witnesses, that Pettys expressed much solicitude to save the passengers, and advised Captain Richardson to exert himself. Before Pettys left the sinking vessel, it is charged that he used force to prevent the passengers from entering the boats until he and his crew were safe. This is not proved, except upon very doubtful evidence. Before he left the boat, Pettys directed her to be listed down to the starboard, with the view to elevate the wounded part above the water. The vessel was careened, but it did not save her from sinking.

Captain Pettys, it is proved, received a severe wound in the head, directly after the collision, which for a time disabled him; and it seems he was under medical treatment for some time after his arrival at Erie. He is spoken of by the witnesses as a competent and popular master. Capt. Richardson says, when the propeller reached Erie, not being acquainted with the entrance to the harbor, he hesitated about entering it, when Captain Pettys took the command of the vessel and landed her. If this be so, his wound could not have been as severe as some of the witnesses supposed. But I cannot but observe that the haste with which Captain Pettys left the sinking steamer shows that he had not the moral daring which fitted him for such a crisis. The captain of a ship should be the last to leave her; he should go down with her or buffet the waves, rather than save himself by occupying a place in a life-boat, to the exclusion of

a passenger. The wound might, perhaps, have influenced the act of Captain Pettys, and may excuse him in leaving the steamer. Carney, the second mate, remained on the wreck until after sunrise. And, from the evidence, it appears all the passengers might have been saved if they had collected on that part of the stern of the Atlantic which remained above water, until after sunrise. Captain Richardson and McNatt, by unremitting and judicious efforts, rescued many of the passengers.

The weight of the responsibility for this great calamity lies on the propeller. The Atlantic was in fault, but not in the same degree as the propeller. Where the fault is mutual, the damages are divided, and not apportioned by the comparative culpabilities of the parties. The decree of the District Court is reversed, and a decree will be entered that the damages stipulated be divided, one-half of which shall be paid to the libellants by the respondents.

It is not improper to remark, that the additional evidence procured in this case since the decree in the District Court, has greatly changed its aspect. In the argument, the counsel for the libellants admitted the decree in that court was correct, on the evidence before it.

In the Superior Court of Baltimore, January, 1857.

MONTGOMERY vs. WHITTINGTON, HOOPER, RICKETTS AND MURPHY.

1. Where one W., the defendant, and one M., the complainant, entered into a contract and agreement whereby the said W. became the agent and trustee of the said M., to sell his interest in the steamboat *Jewess*, under certain terms and upon certain stipulations; and where, in direct violation of the terms of the contract, co-operating and conspiring with one H., who also owned a moiety of the steamboat, the said W. sold to R., his partner, the interest of his cestui que trust, and advanced part of the purchase money, the sale being made at a lower price than had been previously offered, and, within thirty days of the sale, took, by the Custom House documents, title and possession to himself of a certain interest in the said steamboat, the sale was held void, as being in violation of the general and universally established doctrine, that trustees are incapable of purchasing trust property themselves.

2. The general doctrine of the relations between cestuis que trust and trustees discussed.
3. The cestui que trust is entitled to the full value of the property at the time of the sale, as damages, if it is lost or not in a condition to be returned.

The opinion of the court was delivered by

LEE, J.—In April, 1854, James Montgomery filed his bill of complaint in this court, setting forth that on the 9th day of January, 1854, he was possessed of one undivided half of a steamer called the "Jewess," and that Wm. E. Murphy, of Louisiana, was the owner of the other half; that from some disagreement between Murphy and himself, a libel was filed for and on behalf of said Murphy, in the District Court of the United States, for the State of Maryland, for the purpose of obtaining a sale or division of said steamer, and that during the pendency of said proceedings, Murphy transferred, by an absolute bill of sale, his undivided half of said vessel to one James Hooper, of the city of Baltimore.

That it had become necessary for the payment of claims against the steamer, to have her sold on terms that would realize a fair price, and the complainant, yielding to this exigency, agreed to have such a sale made, and that during the consultation of this subject the defendant, John Whittington, persuaded him not to have the sale made by or under the control of the attorneys of the parties, but that he, as a merchant, acquainted with the value of vessels, could effect a better sale and could prevent any sacrifice of the steamer, and as a return for his services, would ask only $2\frac{1}{2}$ per cent. for his commission.

Confiding in the defendant and his representations, the complainant alleges that he gave him an absolute bill of sale of his undivided half interest in said "Jewess," and that the steamer, being at that time in the hands of the marshal, deteriorating in value and incurring expenses, he, without reflection, and from his entire confidence in the defendant, executed this bill of sale without naming or reserving any of the trusts or rights it was intended to secure.

That he afterwards, upon the advice of counsel, required the true purpose of said bill of sale to be expressed in writing, and that the defendant accordingly executed and delivered the agreement of *trust*

marked (exhibit J. M., No. 1), in the printed record, in the following words—

“Articles of agreement made and executed on this ninth day of January, eighteen hundred and fifty-four, by and between James Montgomery and John Whittington, in relation to the steamer Jewess, and a bill of sale executed to him this day by the said James Montgomery, for his interest in said vessel.

It is agreed first, that the said Whittington is to unite with James Hooper in the sale of the said vessel, and to charge for the sale two-and-a-half per cent. on the whole vessel, so that he will receive one-and-a-quarter per cent. and the said Hooper the same. The said sale to be made for one-third cash and the residue for approved paper, at four, six and eight months, with interest.

But the said sale is not to be made before the twenty-eighth day of February next, and in the meanwhile, if the said Montgomery shall purchase from James Hooper his half of the said vessel, then no sale is to be made and no commissions charged; but the said Whittington is to re-convey the said steamer to the said Montgomery without any further consideration, the said bill of sale having been made for the said purpose.

And it is further agreed, that if such sale shall be made as aforesaid, the proceeds are to be applied to the payment of commissions and expenses, and afterwards to the payment of all the debts of the said steamer “Jewess,” and the residue to be paid over to the said James Montgomery and James Hooper, in equal proportions, after crediting advances made by the said Montgomery and William E. Murphy, from whom the said Hooper purchased his interest, so that the said Montgomery and the said Murphy or Hooper shall, before receiving the residue, after paying debts, have been put upon an equal footing as to the money already paid for the said steamer; if the said Whittington shall have to make any advances for the said steamer, which advances are to be confined to necessary expenses.

It is further agreed, that in case the said James Montgomery shall object to the payment of any claim, he may suspend the same by giving security to the said Hooper and the said Whittington, to indemnify them therefrom and against the same, in which case the

proceeds of the sale may be distributed without reference to any such claim.

As witness our hands and seals the day and year first aforesaid.

JOHN WHITTINGTON, [SEAL.]

JAMES MONTGOMERY, [SEAL.]

Signed and sealed in presence of

SAMUEL L. CHAMBERLAIN.

Interlineation, second page, beginning at the word "if" and ending at "expenses," being made before signing; and also the words "and the said Whittington," in the third page, and the word "said" in the first page.

SAMUEL L. CHAMBERLAIN."—

—which expressly authorizes Whittington to act *only* as *agent* and *trustee* for the complainant, and as such to make a sale of his (complainant's) interest in said steamer upon the terms and at the time therein specified, and after paying the claims against said vessel out of the proceeds, to pay over the surplus respectively to Hooper, the holder of Murphy's half, and to Montgomery the complainant.

The bill then alleges that in direct violation of this trust, the defendant, Whittington, united and conspired with said Hooper, and that they advertised and offered for sale the steamer, on the 15th of February, 1854, but, upon the remonstrance and objections of the complainant, the sale was stopped, and the vessel was withdrawn, after a bid of \$27,500. That, afterward, Hooper and Whittington, confederating and uniting to injure him did, without his consent, again advertise the "Jewess" for peremptory sale, on the 1st of March, 1854, and did not state in the advertisement the terms of sale, as required by the agreement.

The complainant also states that the defendants, Hooper and Whittington, well knew, at that time, that the steamer had cost, in the original purchase and repairs, upwards of \$20,000, and that the debts due by her were, then, not large in amount, yet, notwithstanding, they put her up for sale, on the 1st of March, without notice to the public of the *terms of sale* named in the agreement, J. M., No. 1, and that she was struck off, after a languid bidding, with a small

attendance at the Exchange, and was knocked down at the sum of \$12,500, against the urgent remonstrances of the complainant, who was present, but unable to arrest the sale or prevent the sacrifice; and that Wesley Ricketts, the partner of Whittington, became the purchaser of the steamer at this bid, and on terms different from those agreed upon and set out in the agreement referred to.

The bill then charges that, after this sale, Ricketts and Whittington took possession of the steamer at once, and that the defendant Whittington advanced all the money required for her machinery and repairs; and it is in evidence, and shown by the books of Ricketts and Whittington, that, on the 2d of March, the day after the sale, a cash check is charged to the steamer Jewess of \$1,000, and credited to the firm of Ricketts & Whittington.

And this result, so disastrous, as the complainant alleges, was brought about through the agency and co-operation of Hooper with the defendant, Whittington, whom he knew was acting solely as the agent and trustee of the complainant at the time he exacted a bond from said Whittington to compel a sale at all hazards on the 1st of March, and charges upon this statement of the case, a fraudulent conspiracy between them to deprive him of his just rights and property in said steamer.

The bill further alleges that Whittington is answerable for the breach of trust involved in such a procedure, and ought to account for the real value of the vessel, as it may be shown, and finally prays, that the sale may be decreed null and void, as being fraudulent and contrary to equity; and that a re-sale shall be directed for the purposes intended by the agreement, exhibit J. M., No. 1; and also prays general relief, &c., &c.

To this bill, the defendants, Whittington, Hooper, Ricketts and Murphy, have filed their separate answers, generally denying any fraud, collusion, or mal-conduct in the disposition of the steamer on the 1st March, and assert that the sale was bona fide, and made with the consent of Montgomery under the most favorable circumstances, and for her real value; and refer, to support their answer, to the testimony taken by them in the cause and to be found in the record.

These answers, under the act of assembly, were not required to be given under oath, and therefore the bill and answers amount only to an affirmation and denial of the matters and things therein stated, and must depend on the proof alone, which in this cause is full and voluminous on both sides.

Indeed, much of the testimony has been properly excepted to on several grounds, some of it consisting alone in the expression of opinions as to the value of the steamer in controversy.

Before, however, turning to this conflicting evidence upon the *value* of the steamer, I shall first examine the most obvious and important question which, "in limine" upon the bill, answers and conceded facts, presents itself.

It is not denied, but admitted that the absolute bill of sale given by Montgomery to Whittington on the 9th of January, 1854, was (as afterwards expressed by the articles of agreement filed, as exhibit J. M., No. 1,) a conveyance or transfer of the *Jewess in trust*, for the purposes and on the terms specifically set forth in this paper. That Whittington, the trustee and defendant, was *only* authorized to act in the sale of said steamer, as the trustee or agent of the complainant, Montgomery, being entitled *directly* to no other benefit from the execution of the trust than the commissions of two and a half per cent. upon the proceeds of the sale of said vessel.

In this fiduciary character, then, he appears before a court of chancery and asks the confirmation and approval of the sale made by him on the 1st of March, 1854.

The evidence, (uncontradicted,) on both sides, shows that the sale was not made by Hooper and himself on terms different from those set out in the agreement J. M., No. 1; and at the sale Wesley Ricketts, a partner of the defendant Whittington, became the purchaser of the steamer for the sum of \$12,500; that the first payment on the purchase was made on the 2d of March, by a check of \$1,000 of the firm of Ricketts & Whittington, and that the defendant Whittington immediately thereafter assumed a control over the said steamer, and exercised some of the rights of ownership.

It is further in proof from the testimony of D. O. Laws, a wit-

ness examined by the defendants, and then in the employ of Ricketts & Whittington, that he was present when the said Whittington on the morning of the sale offered to *lend* Wesley Ricketts, his partner, the sum of \$10,000 to buy the steamer. It is also in proof that after the purchase by Ricketts, alterations and repairs were made on the steamer to the amount of \$4,052 11, and these were paid for by Ricketts & Whittington. Thus manifestly showing, that although *momentarily* separated, at the sale of 1st of March, yet Whittington (besides furnishing or offering to furnish \$10,000 for the purchase) united the next day with Ricketts in paying for the vessel and afterwards for the repairs and alterations, leaving the conclusion irresistible that the purchase was made on their joint account as partners.

It is true a witness, John Ricketts, (a brother of Wesley Ricketts) states that Whittington at first declined buying the vessel, and *immediately* after the sale *hesitated*, or to use the expressive language of the witness, "*dwelt on the matter.*" How long he dwelt can only be accurately determined by the subsequent acts of the party, for besides paying on the 2d of March, \$1,000 on account of the purchase as stated, it appears that on the 31st of March, not a month after this sale and purchase, a paper—complainant's exhibit (A)—was filed in the Baltimore Custom House, which is as follows—

"Know all men by these presents, That we, John Whittington and James Hooper, both of the city of Baltimore, State of Maryland, owners of the steamship or vessel called the "Jewess," of Baltimore, for and in consideration of the sum of twelve thousand five hundred dollars to us in hand paid at the time of the perfection of these presents by John Whittington and Wesley Ricketts, both of the city of Baltimore and State aforesaid, trading under the firm of Ricketts & Whittington, the receipt whereof is hereby acknowledged, have granted, bargained, sold, assigned, transferred and set over—and by these presents do grant, bargain, sell, assign, transfer and set over unto the said John Whittington and Wesley Ricketts, their executors, administrators, and assigns all that the said steamship or vessel "Jewess," of Baltimore, together with all and singular her masts, yards, sails, rigging, anchors, cable, boats, tackle, apparel

and appurtenances, as she now is, and is more particularly described in a certificate of enrollment, granted her at the port of Baltimore, in the following words :

'No. 45 (Forty-Five) Enrollment.'—In conformity to an act of the Congress of the United States of America, entitled 'An Act for the enrolling and licensing of ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same,' John Whittington, of Baltimore, State of Maryland, half owner, having taken or subscribed the oath required by the said act, and having sworn that he, together with James Hooper, of Baltimore, aforesaid, half owners, are citizens of the United States, sole owners of the ship or vessel called "Jewess," of Baltimore, whereof L. D. Morgan is at present master, and as he hath sworn is a citizen of the United States, and that the said ship or vessel was built in Baltimore, aforesaid, in the year eighteen hundred and thirty-nine, (1839,) as appears by a certificate of enrolment, No. 7, granted at this port the seventh January, now surrendered owners changed.

Seal of the
Treasurer of the
United States.

And said certificate having certified that the said ship or vessel has one deck and three masts, and that her length is two hundred feet, her breadth twenty-two feet ten inches, her depth nine feet two inches, and that she measures four hundred and ten tons and ninety-five parts of a ton ; that she is a steamship ; has a square stern ; no galleries, and plain head.

Seal of the
Naval Officer of
the port.

And the said owners having agreed to the description and admeasurement above specified, and sufficient security having been given according to the said act, the said steamship having been duly enrolled at the port of Baltimore.

Given under our hands and seals at the port of Baltimore, this eighth day of March, in the year one thousand eight thousand and fifty-four.'

To have and to hold the said steamship or vessel called the "Jewess," of Baltimore, and the appurtenances thereunto belonging, unto the said John Whittington and Wesley Ricketts, their

executors, administrators and assigns, to the only proper use and behoof, and as the proper goods and chattels of the said John Whittington and Wesley Ricketts, their executors, administrators and assigns, from henceforth, forever; and we, the said John Whittington and James Hooper, for ourselves, our executors and assigns, do hereby covenant and agree to, and with the said John Whittington and Wesley Ricketts, their executors, administrators and assigns, that at the execution of these presents, we are the true and lawful owners of the said steamship called the "Jewess," of Baltimore, and appurtenances, and have full right and authority to sell and dispose of the same, freed from and cleared of all claims, incumbrances or demands whatsoever.

In witness whereof, we have hereunto set our hands and seals, the thirty-first day of March, in the year of our Lord one thousand eight hundred and fifty-four.

JOHN WHITTINGTON, [SEAL.]

JAMES HOOPER, [SEAL.]

Signed, sealed and delivered }
in the presence of }

THOMAS M. MORRIS.

True copy,

PHILLIP F. THOMAS, *Collector.*—

—wherein Whittington and Hooper, calling themselves the *owners* of the steamer *Jewess*, for and in consideration of \$12,500, acknowledged to be paid to them by John Whittington and Wesley Ricketts, "grant, sell and transfer" to Whittington and Ricketts, trading under the firm, &c., of Ricketts & Whittington, the said steamer "Jewess," her tackle, apparel, &c., fully and absolutely.

Without referring further to the testimony in the record showing other acts of ownership and control on the part of Whittington over this steamer, I might well pause, sitting here as a chancellor, and ask what reply or construction can be given to this documentary and conclusive evidence of Whittington's interest in *her*, other than that which I must adopt. This document speaks trumpet-tongued in establishing, beyond all controversy, Whittington's interest in the

purchase of the "Jewess," and his part ownership with Ricketts, not a month after the sale.

And this fact being proved, beyond the possibility of cavil or doubt, the question now recurs, which I shall examine by the lights of judicial authority in England and this country, can a trustee directly or indirectly become a purchaser of, or be *interested* in the sale of trust property confided to him, or can he in any way afterwards acquire an interest therein?

Before looking at the adjudicated cases on this subject, and apart from the conclusive authorities in England, embracing the opinions of the most eminent chancellors, from Lords Hardwicke, Eldon, and others, to the present time, the rule established by them is most clearly defined by Sir Edward Sugden. (See Sugden on Vendors and Vendees, 2d section, p. 109; Vol. 2, p. 887, 11 Lond. ed. 1846.) "It may be laid down," says that able writer, "as a general proposition, that trustees, (unless they are nominally such, to preserve contingent remainders) are incapable of purchasing the trust property themselves, unless under restraints which courts of equity impose, for if persons of confidential character were permitted to avail themselves of any knowledge acquired in that capacity, they might be induced to conceal their information, and not to exercise it for the benefit of persons relying on their integrity. The characters are inconsistent. *"Emptor emit quam minimo potest venditor vendit quam maximo potest."* This principle is to be found broadcast through all the decisions in which the relation of trustee and *cestui que trust* are at all discussed. See *Fox vs. Macketh*, 2 Brown's Chancery Cases, 400; *Baker vs. Carter*, 1 Younge & Collyer, 252; *Campbell vs. Walker*, 5 Vesey, 679; *Exparte Lacey*, 6 Vesey, 627; *Lister vs. Lister*, 1 Younge & Collyer, 629; *Killock vs. Flexney*, 4 Brown's C. C. 47; *Exparte James*, 8 Vesey, 337; *Lowther vs. Lowther*, 18 Vesey, 603; *Whitcomb vs. Minchin*, 5 Maddox, 91; *Murphy vs. O'Shea*, 2 Jones & Latouch, 422; *Randall vs. Errington*, 10 Vesey, 427; *Crow vs. Ballard*, 3 Brown's C. C., 104; *Brookman vs. Rothschild*, 3 Simmons, 214; *Exparte Reynolds*, 5 Vesey, 707. Besides, the rule is so just and consonant with equity and fair dealing, that no jurist could hesitate to maintain and enforce it.

Trusts are the peculiar offspring and favorites of courts of equity, and they have guarded them always with parental fidelity and care, and with an unanimity of judicial decision rarely met with over other subjects of their jurisdiction.

The fiduciary character of trustees, guardians, executors and agents, always impressed upon the performance of the duties they imposed, a sacredness which has been, and will be, preserved from the slightest attempts on their part to impair or violate the obligations they create.

Indeed, the courts hesitate not to visit with condign penalties, all violations of the sacred duty of a trustee whose authority *alone* rests upon the confidential character of his office; he is, whether created by judicial order or private contract, regarded as acting solely and only for his *cestui que trust*, and cannot, directly or indirectly for his own benefit, though proceeding fairly and openly, disregard the duties, or disappoint the objects for which he was appointed.

By the Civil and French law, as promulgated by Domat, and other eminent authors, the "fidei-commisses" and purposes of a trust are made paramount to all other considerations.

Trust and *faith* are, therefore, the solid pillars on which courts of chancery have rested their large and beneficent jurisprudence, so that wrongs, which, by the common and statute law, could not be redressed, will be remedied, and what men in good conscience and fair dealing ought to do, will be decreed to be performed, and the injured party restored to his rights, or compensated for their violation.

Indeed, the books are full of cases where the law, *strictly* administered, is insufficient to reach the remedy, and restore the losses which breaches of trust have occasioned.

But, through the instrumentality of its writ of injunction, a court of chancery can alone arrest impending ruin, and save the injured and outraged party, before the thunderbolt has descended and brought on him irremediable ruin.

Chancery courts give effect to the intentions of parties to a contract, so as to produce and carry out the true object of it. (See Jeremy's Equity, page 486.) Without this power, social rights, laws

based upon liberty, and liberty regulated by laws, would be a mere mockery; and result often in the grossest injustice, if the rights of persons and property were left alone to the strict and inexorable rules of the common and statute laws—to illustrate by a common case: when a bill of exchange, about to be negotiated fraudulently and without consideration, is offered, equity will compel the holder to deliver it up to be cancelled, and in all cases contracts, though the construction of them is the same in equity and at law, yet a court of Chancery, looking at the *intent*, will apply the remedy. (See 2d Vesey, page 445.)

So the rights of married women, a dependent and confiding class, are protected against their husband's acts and obligations, and a cherished patrimony is rescued from the insatiate jaws of creditors, whose tyranny too often inflicts a slavery more galling and crushing than the chains of despotism; and the affections and wishes of domestic life and parental solicitude are, by the hand of equity, in the construction of wills and testaments, realized and preserved to children and descendants, unimpaired.

Equity, therefore, as established, expounded and administered in England and this country, has become the sanctuary and guardian of human trusts, confidences and intentions; which, preserved and enforced, revive into foliage and fruit the cold and arid fields, over which strict common and statute law, and their rigid rules of interpretation and decisions, had for centuries presided.

But it is not my purpose to dwell longer on this grateful view of the present results of equity jurisprudence, and they are only now invoked to honor and defend the great principles established by it, and the great jurists who have administered it.

Many of the modern rules of law are now derived from chancery adjudications.

Presumptions, as against stale debts and demands, and the principles covering the large and all embracing action of assumpsit, trace their origin to this just fountain.

With these reflections which have occurred to me, and in the light of former and late decisions, so innumerable, to some of which I shall refer, I could not hesitate to pronounce the sale in question to

be a violation of a trust, and in this case to declare it null and void, upon the conceded facts and evidence to which I have referred in this record; which, in a word, are, that Whittington, the defendant here, was the trustee of the complainant, Montgomery, under the contract and stipulations of their agreement and contract—he offered the trust property confided to him first for sale on the 15th of February, in direct opposition to the terms of this contract; he then, co-operating and conspiring with Hooper who held the other moiety of the “Jewess” under an absolute bill of sale from Murphy, permitted himself to be bound in the penalty of \$1,000, to sell her at all hazards, and at any sacrifice, on the 1st of March, the earliest day after the 28th of February, the time before which it was agreed she was not to be sold, (except at private sale) after an advertisement which departed from the terms of sale prescribed or omitted to publish them, and at the sale of the 1st of March, having previously advanced, or agreed to advance \$10,000 to his partner Ricketts, permitted him to purchase the steamer at a low price, the bid, as Matthews, the auctioneer, states, being entered to the firm of Ricketts & Whittington on his book, though this is afterwards sought to be explained.

His firm, Ricketts & Whittington, made on the 2d of March, the first payment by their check on this account, and within thirty days, the defendant, Whittington, proclaimed himself a part owner with Hooper, in the Custom House document, (the bill of sale from Hooper & Whittington to Ricketts & Whittington,) and then by the same instrument took the title and possession of the “Jewess” by a conveyance from Hooper and *himself* to Ricketts and *himself*, upon the identical consideration, to wit, \$12,500, which Ricketts gave for her on the 1st of March, thus not only violating his trust, but becoming vendor and vendee in the transaction. He has there abandoned the interests of his *cestui que trust*, and stands on this record disclosed in his true character.

Could human language or actions convey more irresistibly the conclusion, that he did, *indirectly*, through his partner, Ricketts, bid for the steamer, and then directly assumed the right over the steamer as the owner of one undivided half of her?

Here I might rest the case, with an appeal even to the defendant himself, certainly to his counsel, to show from this record, any other conclusion than that to which I have come. Overwhelmed by these facts, they have, however, ingeniously assumed that he did not himself bid, and that afterwards, though a trustee (and the trust unexecuted,) he was not wrong in taking an interest in the steamer.

This is ingenious, but, with great respect, it is unsound, and no authority has been cited to sustain such a proposition. See the cases of *Davoue vs. Fanning*, 2 Johns. 257, and *Hart vs. Ten Eyck*, 2 Johns. 115.

But against the clear application of the safe and conservative rule which I have advanced, and by which this case must stand or fall. The defendant's counsel have referred to one English (*Campbell vs. Walker*, 5 Vesey, 679) and two American cases, which they say authorize the purchase by a trustee of the trust property, that of *Prevost vs. Gratz*, 1 Peters, 365, 378; and *Fisk vs. Sarber*, 6 Watts & Sargent, 18.

It is conceded that a trustee may purchase by consent of a Court of Chancery, or when he is disconnected with the trust and there is a distinct and clear contract, ascertained to be such after a jealous and scrupulous examination of the circumstances that the *cestui que trust* intended that the trustee should buy, that there is no fraud, or concealment. *Michoud vs. Girod*, 4 Howard, 552. But before and since the great leading English case, decided by the House of Lords, of the *York Buildings Company vs. McKenzie*, 2 Bro. P. Cases, down to the case in 4 Howard, decided by the highest tribunal in this country, there is no variableness or shadow of turning in the judgments of all the chancellors and judges who have affirmed and enforced the great and conservative rule which now avoids this sale.

I have perhaps gone more in detail on this question than the case required, but in giving my opinion, I desired to state fully the authorities and grounds on which it rests, and to justify my own conviction of its soundness and justice. If, however, any doubt

could now exist, the decisions of our own State have closed the door forever to all doubt and cavil—so that this doctrine of Thurlow and Hardwicke, of Johnson, Kent and Marshall, now stands impregnable from all assaults, and our Court of Appeals, following, as it was bound to do, the broad current of these high English and American authorities, have re-asserted and affirmed it; who say, that it is well settled that a trustee cannot purchase for himself, at his own sale, directly or indirectly; the policy of the law forbids it, and if he does, the sale will be set aside on the application of the parties interested, or if he sells and becomes *himself interested* in the purchase, the *cestui que trust* is entitled *as of course*, to come in and set aside that purchase, without showing even *actual injury*. See *Simpson vs. Davis*, 5 Harris & Johnson, 148; *Williams' Executors vs. Marshall*, 4 Gill & J. 379; *Mason vs. Martin & Kemp*, 4 Maryland Reports, 133; *Richardson vs. Jones*, 3 Gill & J. 184; *Bell vs. Webb & Mong*, 2 Gill, 169; *Dorsey vs. Dorsey*, 3 Harris & J. 151; *Cross vs. Cohen*, 3 Gill, 257; *Ringgold vs. Ringgold*, 1 Harris & Gill, 70. And I now dismiss this question as definitely settled in Maryland. The respondent's counsel have argued that the sale is voidable and not void; be it so, it is good only till the *cestui que trust*, "as of course," assails it, and his acquiescence or consent in the sale must be with a full knowledge of all the circumstances.

This record shows no acquiescence or approval by Montgomery, for we find him, on the day after the sale, the 2d of March, notifying the defendant Whittington not to make a title, or in any manner part with the steamer, and in April filing his bill to vacate the same, having previously, on the 15th of February, by his remonstrances, compelled a withdrawal of the steamer, and arrested the sale then. Something has been said of Montgomery's assent to the sale of the 15th of February, and his leaving the draft of an advertisement at the counting-room of Whittington & Ricketts for this purpose; but after a careful examination of the testimony in the case on this subject, I can find nothing to show, in the language of the authorities, (see *Davoue vs. Fanning*, 2 Johns. Ch. Rep. 257,

and *Michoud vs. Girod*, 4 Howard, 552,) such an approval and acquiescence, fully and without reserve, or such a delay or laches, in repudiating the conduct or acts of the trustee, as a court of equity would consider an adoption by the *cestui que trust* of those acts, and a confirmation of the sale.

Even the testimony of Hooper, (one of the parties) is inconclusive as to this point. On his examination, at page 37 of the printed record, he says: "Montgomery furnished witness with a paper drawn up in such colors, to advertise the sale of the steamer, painting her so highly, that witness declined advertising her on those terms; but witness took a part of Montgomery's proposed advertisement, and with his own additions to it, advertised the vessel. He does not think *any date was named for the sale* in Montgomery's advertisement; does not know what became of said paper; has caused a search to be made for it."

It is referred to also by Laws, (another witness for the defence,) as made out by Montgomery and left at their counting rooms. But Mr. Williams, acting as Solicitor for Montgomery, distinctly and emphatically contradicts any inference to be drawn, that Montgomery agreed to such a sale on the 15th of February, by stating that on the 14th of February he received a telegraphic dispatch from Montgomery, then in New York, requesting him to have the sale put off; that he Montgomery would be on in the night train, that he reached Baltimore on the morning of the said sale, that he went with Montgomery to the Exchange, and there forbid the sale, telling Whittington that he could not make the sale on that day; that it was "in the teeth of his agreement," that Hooper and Whittington united to persuade him to use his influence with Montgomery to allow the sale to proceed; that they represented to him that there were many strangers about the stand, and that it might be advantageous to a future sale to let the steamer be put up, and that they thought a good sale could be effected of the vessel; that he did all he could in the way of argument and personal influence with Montgomery to induce him to agree to a sale then, but he (Montgomery) resolutely refused; and that neither

Hooper nor Whittington then made any pretence that Montgomery had ever assented to the sale on the 15th of February.

But the fact of his preparing a notice or advertisement of the Jewess, being a part owner, interested, and better acquainted with her value and capabilities, is not, as argued, inconsistent with his conduct and course throughout. He was desirous that his trustee, Whittington, should proceed on the most favorable grounds to execute the trust, and present to the public the steamer in the most favorable light, to insure a full attendance at the sale, and the best possible price for her. So that nowhere can I discover in this record, either before the sale attempted on the 15th of February, or the one made on the 1st of March, any sufficient evidence to justify the belief that the complainant Montgomery, ever authorized, acquiesced in, or approved, either the one or the other, in the terms and in the manner they were made; he stood then as he now stands, by the stipulations and trusts of the agreement made and executed between the defendant Whittington and himself, and so I shall adjudge and decree. I can, therefore, find nothing in this record, from the testimony of the defendant's most favorable witnesses, which, in my judgment, shows such an approval or adoption of this sale, on Montgomery's part, as can take this case out of the great and equitable rule I have adopted. And without imputing to this defendant, or any of them, the original purpose to commit actual fraud by this extraordinary sale, and the combination of Whittington, and Hooper, and Ricketts to effect it, yet it amounts in law and in equity to a fraud on the rights and property of the complainant.

And although (which is not this case) if the course pursued by the trustee had been regular and correct, and the price obtained at the sale fair and adequate, still this trustee could not become directly interested in the purchase.

Having now disposed of the controlling question in this case, the only remaining inquiry is, what compensation or damages shall be awarded to this complainant, and by what measure must they be estimated and fixed. The complainant is entitled upon every principle of equity to the true value of the steamer at the time of the sale

by Whittington & Ricketts to Wright; the vessel has been sold by the defendants and carried beyond the jurisdiction of this court, and there is no possible way by which this court can re-instate this complainant in his interest, but by charging the trustee with the value of the property in the way of compensation or damages.

This sale has been made by Ricketts & Whittington since the filing of this bill, in May, 1854, and the record shows that the "Jewess," having passed into other hands, has been lost at sea, so that no re-sale can be decreed, and her value in the form of damages must now be the subject of such a decree, as equity and justice may require.

The record is full of estimates and values, placed by witnesses on this steamer, at different times, and her character as a sea-worthy vessel has been alternately assailed or maintained by the opinions of many witnesses on both sides.

Montgomery and Murphy are said to have given and expended over \$20,000 for her in the original purchase and repairs.

Messrs. Clackner, Reeder, Dean, Kane, Peters, Morris, Morrison and others, witnesses for complainant, speak of different valuations put on her by themselves and others, and some of them refer to conversations with Ricketts, Whittington and Hooper, in which they regarded her as worth various amounts, but none so low as the sum for which she sold on the 1st of March, except it is to be found in a letter to Everetts and Brown from Hooper, in which he rates her as not being worth more than \$10,500, and in his testimony in this case he says that \$12,000 was the full value of the steamer, and more than she was worth; although but a short time before 1st of March, 1854, Hooper had estimated her value at \$20,000, having on this basis agreed to allow Montgomery to purchase Murphy's half at \$10,000, as shown by his own testimony in this record.

On the other hand (both sides indeed proving too much) Messrs. Leffler, Beachman, Robb, Hooper and others, including a Mr. Jury, differ widely from the complainant's witnesses, and think, as a sea vessel, the "Jewess" was not very valuable. Jury, in fact, says this steamer was as unfit for sea as "a rotten pumpkin," (to use his own language) "such a vessel, to be sure, might go to sea and per-

form a voyage in safety if the weather were fair ; *that might happen to a rotten pumpkin.*"

That she was of value, notwithstanding Mr. Jury's opinion, and estimated as a good steamer for some purposes all others admit ; but amid the conflict of the evidence (being opinions) on this subject, whether given by experts or non-experts, and much of the testimony on both sides is of such a character, tinged besides, with feeling, natural, perhaps, to the vanity of pre-conceived or expressed opinions, and by the prejudices of witnesses ; and upon this sea of the ever-varying and changing waves of opinions, as to the value of the steamer "Jewess," the court must find, as best it can, some anchorage, and that can only be done in safety and justice, by turning to the ground where the defendants Whittington, Hooper and Ricketts rested and formed their own judgment of her value.

Hooper had already regarded her, by his agreement with Montgomery, as worth \$20,000.

And Peters, a witness, states, that Ricketts or Whittington offered her to him for \$20,000 a few days after the first of March. And in fact it is in proof that she was withdrawn on the 15th of February, after a bid of \$27,500 by Mr. Peters, in good faith, and Montgomery then limited her, if sold on that day, to \$35,000 ; be this as it may, I might find great difficulty in coming to a just conclusion of the measure of value in this case, but for the estimate and valuation, Whittington, the defendant, and his partner, Ricketts, have in the most solemn form, placed on this steamer, which is found in the testimony of D. O. Laws, their clerk, who says, he knows of the sale by Ricketts & Whittington, of the "Jewess," to J. J. Wright, of New York ; the amount realized from this sale by them is \$9,000 ; there is a balance remaining unpaid of \$21,000, with interest, consisting of drafts, &c., which he names.

The defendants, Ricketts and Whittington, have therefore, by this sale to Wright, made in May, 1854, placed an estimate and value upon the "Jewess" by which they must now abide.

The opinions of witnesses varying from \$20,000 to \$80,000 in the record can give no safe measure of value ; but the well considered and deliberate estimate of Whittington & Ricketts, *as owners of the*

steamer, expressed in their sale to Wright, is the only just and proper standard by which a court of equity can ascertain, with justice to all parties, the true measure of value and damages in this case. It is the judgment of the defendants themselves, and I shall adopt and enforce it.

Although, as Chancellor Johnson well says, in 2 Chan. Rep. 108, "the rule of law and equity is strict and severe in such cases, and if damages are sustained, they are given to the utmost value that the article is worth or will bring." See also 15 Vesey, 439, the cases of *Lupton vs. White*; *Amory vs. De Lamaire*, 1 Strange, 505; *Denton vs. Stewart*, 1 Cox, Ch. R., 258; *Hart vs. Ten Eyck*, 2 Johns. 115; *Ringgold vs. Ringgold*, 1 Harris & Gill, (Maryland Reports) 70; all of these cases go to the extent that the *cestui que trust* is entitled to the full value of the property at the time of sale by the trustee.

In the application of these principles, I shall take the time of the sale to J. J. Wright, as the period at which to estimate the value of the *Jewess*, and decree that the defendant Whittington, shall pay one half of the sum of \$30,000, being the value, and true value, which he then placed upon the vessel himself, and for which sum, he and his partner, Ricketts, sold her, and to the payment of which sum they received \$9,000 cash, and notes and mortgages from the vendee, Wright, amounting to the sum of \$30,000 in all.

But it has been assumed that this sale to Wright, was speculative and on paper merely, and should not be a guide as to the true value of the vessel; but there is nothing in this record to sustain such a view. The defendants regarded it as a real sale, and supposed that all the parties were perfectly good, and cannot now be permitted to repudiate their own acts or impeach the correctness of their own judgments as to the value of the "*Jewess*."

I will sign a decree in the case, fixing the value of the steamer, when disposed of by the defendants Whittington & Ricketts, at thirty thousand dollars, and direct the auditor to adjust and settle an account in the case, allowing the defendant credit for one half of such bills for such repairs made on the steamer as were necessary and indispensable, after charging him with one half of any materials,

such as old copper, &c., taken off or from said steamer Jewess, and also allowing him for the payment of one half of any just debts which may have been paid by him, and which had been incurred for and on account of the said steamer "Jewess" by Montgomery, previous to the conveyance to Whittington, on the 9th of January, 1854.

In the Circuit Court of Wisconsin,—May Term, 1854.

MERRIHEW vs. THE MILWAUKEE AND MISSISSIPPI RAILROAD COMPANY.

1. The Board of Directors of a railroad company may make rules and regulations in relation to their business, but they must be reasonable, lawful, and within the limits of their charter. The establishment of certain trains for the exclusive transportation of passengers and their baggage, and other trains exclusively for the carrying of freight, is a reasonable regulation.
2. A person cannot, by merely paying his fare and procuring his ticket, as a passenger, compel a railroad company to carry him daily, together with his trunk or trunks, when such trunk or trunks contain merchandise, money and other valuable matter known as "express matter."

The charge of the court was delivered by

HUBBELL, J.—This action is brought to recover damages for the alleged wrongful acts of the defendants, the Milwaukee and Mississippi Railroad Company.

Railroads are of modern date, and novel questions are constantly arising between them and individuals, which require the consideration of courts and juries. This is the first time any of the questions involved in this case have been presented to this court. It will be my duty to give you the law relative to them, to the best of my ability.

The plaintiff complains of two wrongful acts. First, That he had a paper called a pass, signed by Jno. Catlin, President of the company, and that he had presented this pass to the conductor on the train and was refused a passage upon it.

Second. That he offered to go on board of the cars at Milwaukee for the purpose of being carried west on the road, and tendered the

usual ticket for his fare, and was not allowed to go. These facts sufficiently appear from the evidence and the admission of the parties.

The defendants contend that they were justified in these refusals, under the circumstances of the case.

And, 1st. The defendants alledge that the pass was revoked, or re-called by the company, and that the company rightfully refused to carry the plaintiff upon it.

On this point, I have to say to you that the instrument itself carries no evidence of a consideration paid. It is a mere license to pass, or a naked undertaking, without consideration expressed, to carry the plaintiff. It was good until it was revoked, and no longer. If, while the defendants were carrying the plaintiff under this pass, they had injured him, or his baggage, by carelessness, they would have been liable for any damage proved. And if the plaintiff, relying upon the expectation or belief that the pass would not be revoked, had placed himself in a situation where its revocation caused him an injury, it may be that, on proof of such special injury, damages might be recovered. But the revocation was within the power of the company, and was not, in itself, a wrongful act, but would only become so from the manner of doing it, which must be proved. Unless, therefore, you find by the evidence, that some consideration was paid for the pass, or that some passed or existed between the parties, you will find that the plaintiff cannot recover upon the ground of its revocation, since there is no proof of special damage. As to the right to revoke it—it appears that Mr. Brodhead was Superintendent of the company, and had authority to revoke it, and ordered it revoked before the passage was refused by the conductors. This might be regarded as sufficient authority for that purpose. But it appears that the conductors were officers and agents of the company, acting as such, and the defendants here have adopted and sanctioned their act. In the absence of proof that their act was unauthorized at the time, this is conclusive of the authority of the conductors.

Second. The defendants contend that they rightfully refused to carry the plaintiff, when he offered to go, on his ticket. It is ad-

mitted that the ticket was evidence of payment of the proper fare of a passenger. This point involves several important considerations.

The defendants were doing the business of common carriers of freight and passengers on the line of their road. As such, they were subject to the laws regulating common carriers. As a corporation they were not subject to greater liabilities, nor entitled to greater privileges, than private companies engaged in the same employment. As a corporate body they were entitled to do only those things which their charter authorized, and they could not lawfully do any thing prohibited by their charter. As common carriers they were bound to carry all freight and all passengers which were presented for transportation and paid for ; or to show some good cause or reason for not conveying them. But for their own convenience and safety, and for the convenience and safety of the public, they were entitled to establish rules and regulations for the management of their business. These rules and regulations have no limits, except that they must be reasonable, lawful and within the limits of the charter. And these regulations might be adopted by the Board of Directors, in the form of by-laws or resolutions, under their corporate seal, or by any officer or agent having charge of any particular branch of their business, in relation to the business committed to his charge. In this manner, the company or its officers might regulate the number of trains to be run daily, the time of departure, the rate of speed, the quantity and kind of loading for each car, the mode and time of receiving freight, giving receipts, issuing tickets, taking fare, &c., &c. And they might, in like manner, establish trains exclusively for passengers, and exclusively for freight, or mix and divide them as they saw fit. The public, all the while, might require a reasonable and proper regard for the safety and convenience of all those having business to do with the company. In the present case, the defendants allege that they had established a train for carrying passengers, with their baggage exclusively, and that they had also established a train or trains for the carrying of *freight*; and had presented reasonable accommodations to the public in both cases. If they furnished reasonable and proper

facilities to the public, for transporting freight and passengers, it was not a legal ground of complaint that they carried one or more passengers free of charge, as a compliment or favor. If, for instance, the passenger train contained sufficient and proper cars for those passengers who paid, the company had a right to run extra cars and to run them empty, or to load them as they saw fit. They might permit, if they so pleased, a shoemaker to occupy one, a tailor another and a grocery dealer another, and still the only question would be—is this allowed by the charter, and is there still reasonable and proper accommodation for all the passengers who have paid ?

The defendants might, in the same way, as a gratuity, or for pay, allow the United States mails to be carried in the passenger train ; or they might authorize the carrying of express matter in such train, by Holton & Eddy, or Flanders & Co., or any one else. The question would still be—have they provided reasonable and proper means for transporting freight and passengers generally ? Unless it is the legal right of all persons to have their freight conveyed by the *passenger train*, there is no ground of action because a particular individual is allowed to put his freight on that train ; no more than there would be on the part of passengers who *had paid* fare, because one or more had been suffered to pass without pay.

In the present case, if you find that the company contracted with Holton & Eddy to carry their express matter by the passenger train, and if you still find that the company had made reasonable and proper provision for carrying freight generally, the contract with Holton & Eddy was lawful and proper, and neither the plaintiff, nor any one else, had a right to interfere with this business.

Now, the defendants allege that they had made this contract, and that they excluded the freight of others from that train ; and that the plaintiff had been engaged interfering with this lawful business of theirs, and in attempts to get his freight on the passenger train, contrary to their established rules ; and they allege further, that, at the time he offered to go on the cars and presented his ticket, he was engaged in such business, or that they had good reason to believe he was.

If these several facts, or steps in the defence are proved, then the refusal by the conductor was proper. But the defendants have the burden of establishing these several facts to make out their case. It is proved that the plaintiff had paid his fare and presented himself, at the starting of the train, to go out as a passenger. They were bound to carry him, or show a good cause for refusing. If you find that the plaintiff was endeavoring to violate the reasonable and proper rules of the company and to interfere with their lawful business, and was going out for that purpose, or that the agents of the company had good reason to believe he was going out for that purpose, they were not bound to carry him, and he cannot maintain this action for the refusal. He should have disclaimed his purpose to go on the express business, or to interfere with the lawful business of the company.

The charter of this company has been granted by the legislature, for a double purpose; first to establish a railroad, and accommodate the public by the facilities it affords for the transportation of persons and property; Second, To induce and enable the company, by the profits of their business, to make a good road and conduct it efficiently and properly. The benefit is mutual and reciprocal. The company are bound reasonably to accommodate the public; and otherwise may do all acts authorized by their charter for their own benefit and in their own way.

New York Common Pleas,—January Term, 1857.

JAMES M. LEWIS vs. JOHN A. GRAHAM AND OTHERS.

1. The distinction between a pledge and a mortgage. Where B had given G, the defendant, certain promissory notes and at the same time delivered to him sundry certificates of Illinois State indebtedness, and made an agreement that if the notes were unpaid at maturity, the defendants were authorized to dispose of and sell the same sixty days after the maturity of the notes and apply the proceeds to the credit of B, *held*, that this was a pledge and not a mortgage.
2. That on forfeiture for non-payment of the notes, the pledgees were required to demand payment and give notice of the intended sale, before sale of the securities could be made by them, so as to deprive the pledgor of his right to redeem.
3. That demand and notice would apply only to such securities pledged as were specially set forth in such demand, and that a sale of any pledges without notice would be invalid.

4. That a special partner may, under the law in New York, purchase securities which are sold by his partners as pledges forfeited for non-payment of notes held by the firm.
5. An offer to pay notes without any actual tender of the money is sufficient, if such tender would be useless by reason of the defendants' having previously sold the securities.

H. P. Fessenden, plaintiff's attorney.

B. W. Bonney, counsel.

Mott & Murray, defendants' attorneys.

S. A. Foote, counsel.

The facts are stated in the opinion of the court, which was delivered by

INGRAHAM, J.—The plaintiff has brought this action against the defendants, who are members of a limited partnership, to obtain an account claiming a right to redeem certain securities left by Nathl. J. Brown, the assignor of the plaintiff, with the defendants, to secure the payment of two notes of Brown, held by the defendants.

In August, 1844, the defendants were in partnership, Varnum being the special partner, and the other defendants general partners. At that time, one Brown, of Illinois, for a good consideration, gave to the defendants' firm his two promissory notes for \$2,736 87, payable twelve months after date.

Brown delivered at the same time, as collateral security for the said two notes, sundry certificates of Illinois State indebtedness, some drawing interest, and some without any interest specified therein, amounting to \$8,500.

Afterwards, in 1846, Brown delivered to the defendants, as further security for the said notes, eight other certificates of Illinois indebtedness, each for \$132 50, payable, with interest, at a future day.

The agreement under which these notes were given, with the securities, was in writing. By it, Brown agreed that if the notes were not paid at the expiration of twelve months, the securities or collaterals were to be under the control of the defendants' firm, and said firm was authorized to dispose of and sell said securities after sixty days from the maturity of the notes, and apply the proceeds thereof to the credit of Brown.

The collaterals were to be sold at the highest market value in New York ; and the firm was only authorized to sell so much of the collaterals as would pay off and discharge the indebtedness of Brown ; Brown's notes remained unpaid at maturity, excepting as to \$200, which was paid on one of the notes when it fell due. The defendants' firm repeatedly demanded payment of Brown, prior to 18th of January, 1848, by letters through the mail, which were received by Brown, and on 18th January, 1848, they sent Brown a letter, which was received by him in Illinois, demanding payment, and enclosing a notice that all the securities held by them as collateral, and delivered when the notes were passed to Brown, would be sold on the 21st of February, to pay indebtedness of Brown on his notes to them. This notice did not include the eight certificates delivered in 1846, as they were not mentioned therein. An answer was received to this letter, dated 2d February, acknowledging that such letter came to hand that day, suggesting modes of settlement, and asking a further delay of sixty days.

On the 21st of February the securities were all sold at auction, including those delivered in 1846, for a sum less than the amount due to the defendants, and were purchased by the special partner, Varnum, on his own account.

On the 21st of February, 1848, the defendants wrote Brown a letter, informing him of the sale, and enclosing an account showing a balance due from Brown of \$1,261, the payment of which was claimed by them. In January, 1854, Brown offered to the defendant, Varnum, in writing, to pay off the amount of the notes and interest, and demanded the delivery to him of the collaterals held by him, and credit for the money paid on them, which was refused.

On 21st January, 1854, Brown assigned his claims to the plaintiff for all the securities so pledged by him, in trust, to collect the same, and out of the proceeds to pay the expenses and two and a-half per cent. commissions ; then to pay to Hayes & Hyer, certain indebtedness of Brown to them ; and lastly, to pay over the proceeds to Brown or his legal representatives.

This action was commenced by the assignee on the 18th February, 1854.

An objection is taken by the defence that sufficient parties are not before the court, because the *cestuis qui trust*, under the assignment of Brown, are not named as plaintiffs. Before the code, there was no necessity for joining them in such an action. The assignee had full power to collect such claims in his own name. By the 111th section of the Code of Procedure every action is to be brought in the name of the real party in interest; but by section 113, an exception is made in favor of a trustee of an express trust, and some other cases, in which an action may be maintained by the trustee without joining with him the person for whose benefit the action is prosecuted.

The subsequent clause of 1851 was not intended to limit the meaning of the term trustee of an express trust to the case therein mentioned, but to extend it so that it should *include* a person with whom the contract is made for the benefit of another. I think there can be no doubt as to the right of the plaintiff to maintain the action in his own name, without joining *cestuis que trust* as parties.

Even if it were necessary, however, the defendants cannot now make the objection. By section 144, defect of parties may be objected to by the demurrer, and by section, 147, in the answer in certain cases. If no such objection is taken either by demurrer or answer, the defendant is deemed to have waived the same. As no such objection is properly made in the answer, it cannot now be made available by the defendants.

The first question that arises in an examination of this case upon the merits is, whether the agreement by which these securities were placed in the defendants' possession is to be regarded as a mortgage, or merely pledging the property by way of security. The counsel claims that this agreement is in fact a mortgage, and that as such, the holders had a right to sell the securities forthwith on forfeiture by non-payment.

The distinction stated in *Brownell* agt. *Hawkins*, 4 Barber S. C. 491, is urged in the defendants' favor. A mortgage is a sale of goods, with the condition that if the mortgagor pays, it shall be void. A pledge contains no words of sale, but an authority, if

the debt is not paid, to sell the pledge for that purpose. In the one case, the title passes to the mortgagee, in the other the title remains in the pledgor, although possession is given to the pledgee. Recognizing the distinction as correct, still there is nothing in this agreement that will warrant the conclusion that the assignor intended at the time of execution to convey to the defendants' firm his title to the property pledged. On the contrary, the whole tenor of the instrument shows, I think, conclusively, that his intent was merely to pledge the property as security.

He says therein : "As security for the payment of the notes, I have deposited with them the securities, &c." The defendants' control over the securities was only to be in case of failure to pay the notes for which they were pledged, and then they were only to be sold at the highest market price, and in any event the defendants could only sell enough of the securities to pay the debt of Brown. These provisions are entirely inconsistent with the necessary requisites of a mortgage, in which it is necessary that the title should pass at the time of execution of the mortgage, and by which, if failure to pay at maturity happens, the right of redemption ceases, and the title becomes absolute, subject to relief in a court of equity. *Brown agt. Beanart and al*, 8 Johns. Rep. 96; *Ackley agt. Finch*, 7 Cowen, 299; *Brownell agt. Hawkins*, 4 Barb. S. C. 491.

The clause giving the defendants control of the property, after failure to pay, gives no other or further right than a pledgee has on failure of the pledgor to redeem the pledge. The pledgee has possession, and he thereby obtains the control of the property, so as to proceed according to law and sell the pledge to obtain payment of the debt for which it was pledged. But in case of an ordinary pledge, and to this case by express agreement, he can only sell enough to discharge the debt, and cannot claim a forfeiture of the whole property, as he could under a mortgage. The proper construction of the contract between these parties is to consider it a pledge merely, and not a mortgage. *Dykers agt. Alstyn*, 7 Hill, 497.

I have treated this question on the supposition that the distinction above stated in 4 Barb. S. C., was correct, although I am not

prepared to admit it as broadly as there stated; and the case of *Wilson* agt. *Little*, 2 Comst. 443, shows that actual title to the pledged property is not always sufficient to make the instrument pledging it a mortgage. In that case the property (stock) was deposited as security for the money loaned, with authority to sell on non-payment of the loan, and the stock was actually transferred to the pledgee. There the same grounds were urged as in this, that the instrument was a mortgage, and the property forfeited on non-payment; but the court held, notwithstanding the title had passed to the pledgee, that the instrument was not a mortgage, and that the property pledged could only be sold after demand of payment. See 5 Johns. 258; 10 Johns. 471.

The next question in this case is, what acts are required from the pledgee, after failure to pay the debt, before he can sell the pledge for that purpose. The plaintiff contends that demand of payment from the debtor, and notice of the time and place of such sale, must be served before the sale can legally be made. That a demand of payment is necessary is sustained by all the authorities, Story on Bailment, 348, 310; *Wilson* agt. *Little*, 2 Com. 443; *Stearns* agt. *Marsh*, 4 Denio, 227. The necessity of such demand was conceded by the defendants' counsel upon the trial, and the counsel only differed upon the necessity of notice. In *Stearns* agt. *Marsh*, 4 Duer, 227, Mr. Justice Jewett says: "As the law now is, the pledgee may file a bill in chancery for a foreclosure and proceed to a judicial sale, or he may sell without judicial process, upon giving reasonable notice to the pledgor to redeem and of the intended sale." Again: Personal notice to the pledgor to redeem and of the intended sale, must be given, in order to authorize a sale by the act of the party. Before giving such notice, the pledgee has no right to sell the pledge, and if he do, the pledgor may recover the value of it from him without tendering the debt."

The same rule is adopted in *Brown* agt. *Ward and al.* 9 Howard, 497; 3 Duer, 660; Mr. Justice Hoffman holding that a right to sell property that was pledged could only be exercised after the debt is due, upon a demand for payment and notice of the sale. 2 Kent. Com. 581; Story on Bailment, 208; *Patchin* agt. *Peirce*, 12 Wendell, 61; 4 Kent's Com. 139.

I have not been able to find any case, and none was cited on the argument, distinctly holding that a demand of the money due, without notice of the time and place of sale, was sufficient to protect the pledgee in making the sale.

In the case of *Wilson* agt. *Little*, supra, which was mainly relied on by the defendants' counsel, it is said that the pawnee cannot sell without a demand of payment previously.

But in that case it is nowhere said that a notice of the sale was not necessary, and in the contract on which that action was brought, notice of the sale was dispensed with. See also *Tucker* agt. *Wilson*, 1 P. Wms. 261; *Lockwood* agt. *Ewer*, 2 Atk. 303; *De Lisle* agt. *Priestman*, 1 Browne's Penn. R., 176.

A sale of the pledge was not valid, so as to protect the pledgee, without a previous demand of payment and notice to the pledgor before the sale.

Was the demand and notice as proven in this case, sufficient?

It is in the proof that the pledgees repeatedly demanded payment of the debt due, by letters which were received by Brown.

On the 18th of January, 1848, a letter was sent to Brown, demanding payment, and giving notice of the sale of the stocks pledged as stated in notice of sale enclosed, for the 21st February, next ensuing. This notice only referred to the stocks pledged at the time of the original transaction, and did not include the eight certificates of indebtedness subsequently pledged by Brown, as additional security in 1846.

So far as relates to the property specified in the notice of sale, I think there can be no doubt as to the sufficiency both of the demand and notice. It was made thirty-four days before the sale, and was sufficiently explicit in the demand, and also in the notice, that the property would be sold at the time appointed. No objection is taken to it on these grounds. But it is objected to the sufficiency of this notice, that the time was too short, inasmuch as Brown was at that time in Illinois; and that it appears by Brown's letter in answer to the notice, that it was not received by him until the 2d February. I am not willing to give any such effect to the statement in Brown's letter that the notice came to hand that day.

Presumptively, the notice was sufficient. If the plaintiff relied on the distance of Brown from this city as an objection to the sufficiency of the notice, he should have shown, that the transmission by mail was such as to deprive Brown of the benefit of the notice. Until that is shown we have no right to presume that the course of the mail was such as to prevent Brown from attending to the sale of the property pledged. Even if it be taken for granted that the notice was not received until the 2d February, it would not follow that he had not ample time to come to New York after that time, and have attended to the redemption of the property here.

But such notice cannot be made applicable to the eight certificates of \$132 50 each, which were not included therein. Brown, from the notice served upon him, had a right to conclude that the defendants' firm (the pledgors) did not intend at that time to sell anything except the property advertised in the notice. He knew they could not properly sell at auction any of the property of which they had not given previous notice. The subsequent notice in the papers, for three days, of the intended sale of these certificates does not remedy the defect; Brown had no notice thereof, and he was not bound thereby, and I see no ground on which the omission of these certificates in the first notice can be remedied.

It is contended, however, by the plaintiff, that the sale was void, inasmuch as the defendant, Varnum, was the purchaser, he being the special partner in the defendants' firm.

It must be considered that a purchase by the pledgee—or by one of the pledgees, if there are more than one—does not alter the right of the pledgor; such a purchase does not terminate the bailment, but leaves the purchaser the same responsibility to the pledgor as before the sale. Story on Bailment, 319. The general rule was fully laid down by the chancellor, in *Torrey* agt. *Bank of Orleans*, 9 Paige, 649, 663, as a rule of universal application to all persons coming within its principle, that no party can be permitted to purchase an interest where he has a duty to perform that is inconsistent with the character of purchaser. See *Hawley* agt. *Creamer*, 4 Cow, 736. This doctrine was not disputed by the defendants' counsel, but he denied its applicability to the defendant Varnum, claiming

that his relations as special partner to the other defendant was such as to deprive him of the character of pledgee and of any right to interfere with the pledge, and of course imposed on him no duty towards the pledgor.

The property was pledged to the defendants' firm. The persons then having a right to act in the management of the affairs of the firm, were the bailees, and they only were charged with the duty of selling, at the highest market price, the securities so pledged.

By the statute authorizing limited partnerships, the special partner is prohibited from transacting any business on account of the partnership, nor can he be employed as agent, attorney or otherwise, and any interference contrary to these provisions renders him liable as a general partner. Section 17.

There was no duty which Varnum could assume to discharge in reference to the indebtedness of Brown to the firm without making himself liable as a general partner. As the statute prohibited him from acting, and as in fact he never assumed to act as partner, no duty devolved upon him in reference to the bailment. He could not direct or aid in the sale of the securities. An attempt to interfere with the sale of them, would have made him liable. A refusal to do so did not involve him in any neglect of duty. If this be so, and if, during the partnership, the special partner was not one of the persons charged with the duty of controlling and preserving the pledge, the subsequent dissolution of the partnership did not alter his liability; the bailees were the persons originally constituted by the act of the pledgor, and no other could be substituted by the mere fact that the partnership had been dissolved by its own limitation.

The special partner, it is true, may advise as to the interest of the partnership, but so may any one else. Such advice is no act or control of the partnership funds or duties, and does not in my opinion alter the position of the defendant Varnum. Although this question is not free from difficulty, I am inclined to think the view I have taken of it to be the correct one.

The remaining question is—What tender is necessary to entitle the plaintiff to bring this action?

The tender made was contained in the letter of 18th January, 1854, addressed to the defendant Varnum, stating that the defendants' firm had transferred to him the notes and securities, offering to pay the two notes, and demanding the collaterals. If any had been paid off, the demand was varied accordingly.

The like demand is made upon the firm.

If I am right in my previous conclusions as to the validity of the sale of the first security pledged by Brown, then it is evident that no tender could have been made of the balance until that balance had been ascertained, and if any portion of these securities, either principal or interest, had been collected, the like accounting would be necessary—under either case the offer to pay was sufficient, and as the firm had put it out of their power to comply with their duty, in payment, by selling the certificates of indebtedness, it was not necessary to make any further tender.

In *Wilson* agt. *Little*, 4 Comstock, 449, Mr. Justice Ruggles says, the sale by the defendant before payment demanded was, therefore, wrongful. The defendants having voluntarily put it out of their power to restore the pledge, a tender of the money borrowed would have been fruitless, and was, therefore, unnecessary. The same rule is stated in *Cortelyou* agt. *Lansing*, 2 Caines' Cases in Error, 200.

My conclusions, therefore, are :

First. That the instrument under which these securities were transferred to the defendants' firm, was a pledge, and not a mortgage ;

Second. That on forfeiture for non-payment of the notes, the pledgees were required to demand payment and give notice of the intended sale, before sale of the securities could be made by them, so as to deprive the pledgor of his right to redeem ;

Third. That the demand and notice as to all the securities pledged, except the eight securities pledged in 1846, was sufficient ;

Fourth. That no notice was given of the sale of the eight certificates pledged in 1846, and that such sale was invalid against the plaintiff and Brown.

Fifth. That the special partner, Varnum, was not prohibited, by his relation to the firm, from purchasing the securities at the time of the sale by the pledgees.

Sixth. That the offer of Brown to pay the notes was sufficient, without an actual tender of the money, and that any tender was unnecessary, as the defendants' firm had, by the sale of the securities, rendered such tender fruitless.

It follows, therefore, that the plaintiff is entitled to a judgment directing an account of the moneys received on the securities which were pledged in 1846, and in stating such account; the balance due from the plaintiff on the loan must also be stated. As the complaint avers that such securities have been paid, and the same is not denied in the answer, the only further provision necessary in the judgment would be that the balance remaining unpaid by either party to the other should be recovered, and such order will be reserved until the report of the referee on the accounting is brought in.

Judgment for the plaintiff, that the defendants account, and reference ordered to Michael Ulshoeffer, Esq., to take the account as to the certificates pledged in 1846, and report to this court. Further directions are reserved until the coming in of the report.

In the Court of Common Pleas, Philadelphia County.

TATHAM vs. THE WARDENS OF PHILADELPHIA.

1. It is settled that the writ of mandamus issues only where a ministerial act is to be done, and there is no other specific remedy. It is granted only at the discretion of the court to whom application is made.
2. By the act of 1851, the Board of Wardens on application of the owner of lands on the Delaware, within the limits of Philadelphia, is bound to cause to be defined, at the expense of the applicant, the line of low water mark bounding their jurisdiction, nor has this duty been affected by the Consolidation Act.
3. Windmill island, in the river Delaware, opposite the City of Philadelphia, is within the jurisdiction of the port wardens.

The opinion of the court was delivered by

ALLISON, J.—George N. Tatham presented his petition to this court, praying that a writ of mandamus be awarded, commanding J. E. Harned and others, wardens of the port of Philadelphia to cause to be defined upon the ground, at the expense of the applicant, the line of low water, bounding their jurisdiction of a certain lot on Windmill island, two hundred and fifty feet in breadth or front, east and west ; bounded upon the line of low water mark by the river Delaware ; on the south by the land of David Warren, and on the north by other land of the said Tatham.

The petition recites that the petitioner is the owner of the lot of ground above described, and that he made application in writing to the board of wardens, requesting them to cause said line of low water mark to be defined, which application was refused, and that on the first day of September last, he again applied to the board, asking them to reconsider their rejection of the prayer of his petition ; and that this last communication was laid upon the table by the respondents, and that they continue to refuse to define for him the line bounding their jurisdiction upon the land mentioned in his petition. A rule was granted upon the said wardens to show cause why a writ of mandamus should not be awarded, as prayed for, and upon the return of the rule an answer was put in, showing cause why said rule should not be made absolute.

The first reason assigned is, that the remedy of the petitioner is by appeal, and not by writ of mandamus. This defence, if well taken, would be conclusive against the application ; for the writ, not being a writ of right, is granted only at the discretion of the court, to whom application is made for its allowance ; and this discretion is not exercised in favor of the applicant, unless some proper and lawful purpose be answered by the writ, 2 T. R. 385 ; 1 Cowen, 501, and then only where a ministerial act is to be done, and there is no other specific remedy, *Commonwealth vs. Judges of Philadelphia*, 3 Binney, 273 ; *Griffith vs. Cochran*, 5 Binney, 103. There are various acts of assembly giving appeals to the Courts of Common Pleas and Quarter Sessions from the decision of the

wardens in specific cases, but neither of them have any application to the case before us, unless as was argued, the 12th section of the act of April 28th, 1851, determines that the remedy in this case is by appeal, and therefore, not by mandamus. It says, that any person aggrieved by *any* decision of the board of wardens may have an appeal to the Court of Quarter Sessions or other courts, as provided by laws heretofore existing.

It may be questioned whether the remedies, "provided by laws heretofore existing," are not restricted to the specific cases mentioned in the several acts of assembly passed prior to the act of April 28, 1851, but a decision of this point becomes unnecessary, by reason of the conclusion at which we have arrived, that the refusal of the wardens to define the line of low water mark, as prayed for by the petitioner, is not a decision, or an act performed by them which can be appealed from; but is simply a refusal to do or perform an act imposed upon them as a ministerial duty. The 7th section of the act of April 28th, 1851, requiring that the board of wardens of the port of Philadelphia, on the application of the owner of land bounded by the Delaware and Schuylkill rivers, within the limits of the port, shall cause to be defined upon the ground, at the expense of the applicant, the line of low water mark bounding their jurisdiction. There is nothing here to be decided—no doubt to be solved—no controversy as between themselves and the petitioner, or litigant parties to be determined by them, and therefore nothing from which an appeal will lie. The act to be done is simple and specific; to define the line of low water mark, and so far from leaving it to the discretion or judgment of the wardens, the language of the law is imperative, *shall* cause, &c. An appeal, therefore, is not the proper remedy in this case.

The second reason assigned is, that the power given to the wardens, by the 7th section of the act of April 28th, 1851, has become vested in the Councils of the City of Philadelphia. This conclusion is drawn mainly from the 28th section of the act of consolidation, but it is a conclusion not warranted, we think, by any thing therein contained, for it provides that the wardens to be elected by councils, together with the master warden, shall do and perform the

duties which do now or may by law or ordinance hereafter, belong to the port wardens. The line which by this section the councils are required to fix, is the line *beyond* which no wharf or pier shall be constructed into the tideway of the river, and has no reference whatever to the line of low water mark, although it has been argued that the latter is dependent upon the former, and this is the reason assigned by the wardens for not defining the low water mark line upon Windmill Island. It is difficult to understand how the mere fixing of a point or line, to govern the future extension of wharves, can in any way affect the line of low water mark upon the land of the petitioner. But if it could be made to appear that a certain alteration of the wharf line, by councils, might have the effect anticipated by the respondents, it would be no sufficient answer to the petition of the complainant to the wardens, because it is uncertain whether the present wharf line ever will be changed, and if changed, its effects are at best problematical.

The right of the petitioner to build his wharf to low water mark is a settled, clear and unquestionable right, not dependent or contingent, but an existing, immediate right, which may be exercised at any moment without permission from the board of wardens. But as a heavy penalty is imposed upon any one who builds a wharf or pier into the tideway, beyond the line bounding the jurisdiction of the wardens, without first obtaining the authority of the board; and as the line is to some extent an arbitrary line, bare at low, and covered with water at high tide, the exact location of which is at all times somewhat uncertain, and therefore subject to be disputed; the law very wisely says to the wardens, you *shall* define this line; as upon you is imposed the duty of enforcing the penalty incurred by those who, without your authority, build beyond it. Before the passage of the act of 1851, every owner of land, bounded by the rivers Delaware and Schuylkill, who undertook to wharf in, between low water mark and the fast land, had to take upon himself the risk of an infringement upon the rights of the public; and an infringement of an inch was as fatal as the infringement of a foot, or an hundred feet; an error that any one was liable to fall into, ignorantly, or even in spite of every precaution that could be taken to

avoid such a mistake. The law as it then stood conceded the right to wharf in to a certain line, but had pointed out no way of ascertaining the true location of that line ; and yet it said, if you build one hair's breadth beyond your proper limits, you shall pay \$4,000, and remove the structure from the tideway beyond low water mark. To remedy this just cause of complaint, the act of 1851 was passed ; the 7th section of which remains in full force, unaltered, and unaffected by the act of 1854.

The third ground upon which the answer goes, denies the jurisdiction of the wardens over Windmill Island.

The act of September 22, 1786, 2 Smith's Laws, 388, declares that the island shall be a part of Philadelphia, and by the 1st section of the act of consolidation, Windmill Island is made a portion of the fifth ward of the City of Philadelphia. By the 13th section of the act of the 29th March, 1803, it is provided that when any person shall be desirous to extend any wharf or other building of the nature of a wharf, in the tide way of the Delaware, from *any* part of the city or liberties of Philadelphia, they shall make application, &c. Windmill Island being a part of the city, and having been for seventeen years prior to the passage of the act of 1803, establishing the board of wardens, it is very plain that the island in question is as much under their jurisdiction, as is the western shore of the Delaware, in front of the city and liberties of Philadelphia ; and the reason for bringing the island into subjection to the wardens, for the purposes covered by the act, is most obvious ; for one of the most important objects to be accomplished by the passage of the law was the protection of the Delaware river front, and the establishment of a proper system of wharfage, as essential to the prosperity of the city ; but this would all be to little purpose if the owners of the island could, by the extension of wharves from its western shore, obstruct the channel between the island and the city front to as great an extent as they might deem advisable.

But the 1st section of the act of Feb. 7, 1818, which is substantially a re-enactment of the 13th section of the act of 1803, is conclusive upon this point. It provides that all applications for the extension of wharves into the tide way of the Delaware river from

any part of the city, the Northern Liberties, District of Southwark, or sand bar or island in front of said city, shall be made to the board of wardens ; Windmill Island is, beyond all doubt, covered by one or both of the phrases,—“ any part of the city,” or “ sand bar or island in front of said city.”

By the 5th section of the act of February 4th, 1846, a fine is imposed upon any one who shall fix, or cause to be fixed, any bulk, enclosure, or other obstruction in the tide way of the Delaware, upon any sand bar or island in front of the city, and the wardens are directed to have such obstruction abated or removed. And by the 7th section of the act of April 15th, 1850, it is declared that the act of 1840 shall not be construed to impair the rights of the riparian owners of Windmill Island, or any part thereof, to low water mark. These several acts seem to settle the question raised by the third reason, conclusively against the position taken by the respondents ; but if it rested alone upon the 7th section of the act of 1851, upon which the application of the petitioner to the wardens was based, there would be no escape from the discharge of the duty therein enjoined, for the answer does not deny the ownership of the land mentioned in the petition, nor is it disputed that it is within the limits of the port of Philadelphia, nor that it is bounded by the Delaware river ; these three facts being admitted, or proved if denied, it is the duty of the wardens to obey the directions of the act, irrespective of the question of prior, limited, or general jurisdiction.

The fourth objection is embraced in the second, and for the reasons already given, is not deemed a sufficient answer to the prayer of the petition.

The fifth answer is, that in point of fact it is impossible to fix the line of low water mark as prayed for by the petitioner. But it will not do to rest upon a mere assertion of inability ; it is not pretended that an effort has been made to comply with the directions of the act, nor is the nature or character of the disability set out, that the court may judge whether it is a mere disinclination to perform the duty required, or an actual impediment, which renders it impossible for the respondents to do that which the law says they shall do. The law recognizes a line of low water mark ; it recognizes it as the

line bounding the jurisdiction of the wardens, and to that line the owners of the fast land possess certain rights, which are beyond the control or interference of the respondents. And from all that appears in the pleadings before us, it can be as easily defined, upon the land of the petitioner as it can upon the land of any one bounded by the Delaware river, and until the contrary be shown, the presumption of law is, that an approximate, conventional line of low water mark can be defined by the Wardens, which, when settled and marked, will be treated as the true line between the petitioner and the respondents.

In answer to the sixth reason, it is sufficient to say, that of the advantages or disadvantages that would result to the navigation of the river, and to the trade and commerce of Philadelphia, we have in the determination of this question, no right to inquire, or to allow such considerations to influence in any degree, the rights of the parties to this proceeding. Being of the opinion that it is the clear right of the petitioner to build his wharf to low water mark, and this is the duty of the wardens upon the application which he presented to them, to cause to be defined that line for him, and no sufficient reason having been shown why they have not performed this duty imposed upon them by law, a peremptory mandamus is awarded, as prayed for; our practice being, instead of awarding an alternative mandamus, to hear the parties upon a rule to show cause why a peremptory mandamus should not be granted.

Rule absolute.

NOTICES OF NEW BOOKS.

ABRIDGMENT OF THE DEBATES OF CONGRESS, from 1789 to 1856. From Gale's and Seaton's Annals of Congress, from their Register of Debates, and from the official reported Debates, by John C. Rives. By the Author of the *Thirty Years' View*, Vol. 1. New York: D. Appleton and Company, 846 and 848 Broadway. London: 16 Little Britain, 1857. Philadelphia: J. K. Simon, Agent, No. 89 Walnut street, pp. 802.

This valuable and somewhat ponderous volume has just been laid upon our table. We have not been able as yet to examine it with as much care as we intend to, but so far as our examinations have extended, they have been most satisfactory. The work itself was needed. The historical knowledge which is to be gathered from the Congressional Debates, is at once highly instructive and most important. To no hands could it have been better confided than to Col. Benton's. By the time the second volume shall appear, we shall endeavor to give our readers some more satisfactory account of the work from a more careful perusal.

THE

AMERICAN LAW REGISTER.

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MAY, 1857.  
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OF THE ACCEPTANCE OF GUARANTIES.¹

The increasing attention paid in England and this country to the study of the Roman law, and its affiliated systems of jurisprudence, is a matter for sincere congratulation to those who desire the scientific development of the common law. The changes introduced into the latter by legislation on the one hand, and on the other, an original want or gradual loss of reproductive power in some of its branches, appear to have arrested its progress in several directions. The older sources of our law no longer furnish precedents to govern, or analogies to guide us in the decision of novel questions. We are obliged to seek our materials for reasoning, elsewhere, or at least we must require an induction of principles more comprehensive in its scope. What we lack in our own, must be borrowed from other codes. For aid in this respect, we can, of course, look nowhere with such advantage, as to the Roman jurisprudence. In breadth, logical coherence, elevation of moral standard, as well as minute applicability to the business of ordinary life, it is without a rival, and it stands now, after the lapse of centuries, an amazing monument of the power of human reason.

¹See 1 American Leading Cases, 57, &c., note to *Lent vs. Padelford*, and *Douglass vs. Reynolds*. Our citations are from the fourth edition, with the sheets of which we have been obligingly furnished by the publishers.

But the very facility with which the deficiencies of the common law can be supplied from this inexhaustible storehouse of human wisdom and justice, has its peculiar dangers, against which it behooves us to guard. It is so easy, in case of necessity, to find in, and borrow from that source, principles and doctrines made to our hand, that we do not always study with sufficient care the relations which they bear to the original structure, or fit them with much accuracy to their new position. Yet unless this duty is performed, our labor is worse than useless. Doctrines which, in their proper place, are the natural development of recognized principles, and have grown out in harmony with the other parts of a connected system of law, when transplanted into another system, whose maxims are different and tendencies diverse, will in general, however promising at first the process may appear, lead in the end to discord and confusion. The union between the graft and the original stock can never be perfect, its growth is artificial and unhealthy, and time, instead of blending the parts, only serves to bring into light their radical inconsistency and lack of coherence. The parable which teaches us not to put new wine into old bottles, is as applicable in jurisprudence as in theology.

The obvious truth of this proposition needs no illustration ; if it did, it could find many in the history of English equity jurisprudence. The rules which the latter has adopted with respect to testamentary dispositions, have been taken in great part from the Roman law, and are, to some degree, consistent in themselves, yet so foreign are they to the principles of the common law, that the same language in the same will, may on quite a number of points have quite a different effect, according as its subject is real or personal estate. On the other hand the court of chancery has gradually, by a misapprehension or misapplication of the laws of Rome as to *fidei commissa*, elaborated the " doctrine of trusts," which, however convenient or beneficial in its operation, is an anomaly in jurisprudence.¹ Again, we have imported into our law, the head

¹ See this subject investigated in *McDonogh's Ex'rs vs. Murdoch*, 15 How. U. S. 367, 407, where the prohibition in the Louisiana code, against the creation of *fidei commissa* was held not to apply to trusts as understood in the English law.

of *donationes mortis causa*, which was out of place in our legatory system at the best, and by a blundering interpretation of the original texts have succeeded in producing a curious hybrid, with little resemblance to either parent.¹ To pass to the common law itself, some of the distinctions in the law of bailments, intelligible enough in their origin, but unmeaning or complicated when applied by us, we have retained, others, vital in their character, we have confused. And with respect to the doctrine of contracts in general, where error would seem less likely to occur, there appears to be, nevertheless, a series of chronic misunderstandings prevalent, which it requires constant care to guard against.

One of these latter has been recently exposed in a very clear and able manner, in the learned note to *Douglass vs. Reynolds*, in the second volume of "The American Leading Cases," and in so doing the inherent distinction between the theory of the Roman law, and that of common law, on the subject of contracts, has been explained in a very original and satisfactory manner. Judge Hare's views, indeed, are of so interesting and important a character, that we need not apologize for stating them at length, and in his own language. Before doing so, however, it is necessary to give a brief explanation of the origin and nature of the question in the solution of which they are employed.

The Supreme Court of the United States, in *Douglass vs. Reynolds*, and other cases, had laid down the proposition that in cases of future and contingent guaranties and letters of credit, the guarantor cannot be held bound until he has received notice of the acceptance of the guaranty by the party making or intending to make the advances stipulated. This, though followed in many of the State courts, is contrary to the English cases, and inconsistent with principles established on analogous subjects. Unable to agree to the doctrine in its broad statement, he demonstrates in an elaborate discussion, that the grounds upon which the decisions of the Supreme Court have been at various times supported, are insufficient and unsatisfactory.

¹ See 1 Am. Law Reg. 9.

One of these grounds, that first assumed by the court, rested on the doctrine of notice at common law. This is shown to be clearly untenable, and in point of fact has been abandoned in later cases. Judge Hare establishes conclusively, indeed, upon a full examination of the authorities, that notice of a mere intention to act under a binding contract, can in no case be necessary. In fact, at common law nothing further was required, than that the party to be affected should have information in a reasonable time of the particular act when done, and in many cases the duty of obtaining this information was thrown upon himself.

On the abandonment of this ground, another of a more plausible nature was substituted. This consisted in the assumption that no binding contract is created by a guaranty or letter of credit, until notice of the acceptance thereof by the creditor is communicated by the guarantor. The question is thus brought within the general range of obligations, and placed on the ground of the necessity of mutual concurrent assent of the parties to execute a contract.

“The fair deduction,” says Judge Hare,¹ “from the general course of decision on the subject in the United States, would seem to be, that no obligation can arise from acts done by one man on the faith of a promise given by another, unless the assent of the promisee, and his intention to act under the promise, is known to the promisor, although such knowledge will be as effectual when derived from facts and circumstances, as if it had been communicated by the most formal notice. *The Louisville Man. Co. vs. Welsh*, 10 Howard, 461. Some of the difficulties which have attended the inquiry, unquestionably vanish on attaining this point, because the question ceases to be a branch of the doctrine of notice, and falls within the dominion of the principles which determine when and under what circumstances assent must be communicated, in order to give force and validity to a contract, and render it binding on the contracting parties; and it becomes plain, that the numerous cases in which notice of acceptance has been held essential to the obligation of guarantees, really sustain and depend upon

¹ 2 Am. Leading Cases.

the single proposition, that assent cannot give rise to a contract, unless each party knows or is informed that the other has assented, which may be sufficiently true when the obligation of the contract is meant to be reciprocal and mutual, but not when its sole object is to induce the performance of an act which is subsequently performed ; for if such were the law, there could be no recovery in the common case of a general undertaking to pay a reward to any one who shall find or restore a lost or missing article, or bestow his work or labor in some other specified manner, indicated by the terms of the undertaking. Under such circumstances, it has never been thought necessary, either as a matter of substantial good faith or technical principle, that those who mean to act under the terms of the promise should first signify their intention of doing so, or their assent to the contract, to the person by whom the reward has been offered, or the promise of payment given. On the contrary, the mere fact of pursuing the course requested by the promisor, and arriving at the result desired by him, has always been held sufficient evidence of assent to the terms of the promise ; and there is no necessity for making any direct communication of what is done under it, until the whole is accomplished, and the fulfilment of the promise demanded, nor, as it would seem, even then, if the nature of the performance be such as to be ascertained by the promisor without notice, upon making proper inquiry. *Freeman vs. Boston*, 5 Metcalf, 46 ; *Wetson vs. Dodson*, 3 Carr. & Payne, 162 ; *Waterbury vs. Graham*, 4 Sandford, 215 ; *The Union Bank vs. Coster*, 3 Comstock, 203. This doctrine stands as well upon authority, as it does upon general principle, and the ordinary course of business. Thus, where the promise was, that in consideration that the plaintiff would marry a third person, the defendant would give him ten pounds, it was held, that no notice, either of the intention to marry, or of the fact of marriage, was necessary ; *Beresford vs. Goodrouse*, 1 Rolle, 433. And where the defendant had promised, that if the plaintiff would make a set of sails he would pay for them, notice of the completion of the job was held unnecessary, because the debt became due and was a good cause of action as soon as the sails were completed ; *Willis vs. Scott*, 1 Strange, 88. The point was

decided the same way, in *Lent vs. Padelford*, 10 Mass. 230, and *Duval vs. Trask*, 12 Mass. 154, and again in *Train vs. Gold*, 5 Pick. 880, where a promise that a third person should indemnify the plaintiff, if he went on with an execution which had been placed in his hands, was held to bind the promisor, on proof that the execution had been levied and returned, without notice of an intention to act under the promise, or anything to show that it had been accepted, except a subsequent compliance with its requisitions; although the whole evidence of the contract lay in a letter written by the defendant, who resided at a distance, to which no answer was returned by the promisee, so that the case was in all respects similar to a letter of credit or prospective guaranty. "If," said Wilde, J., in delivering the opinion of the court, "A promise B to pay him a sum of money, if he will do a particular act, and B does the act, the promise thereupon becomes binding, although B at the time of the promise does not engage to do the act. In the intermediate time, the obligation of the contract or promise is suspended; for until the performance of the condition of the promise there is no consideration, and the promise is *nudum pactum*; but on the performance of the condition by the promisee, it is clothed with a valid consideration, which relates back to the promise, and it then becomes obligatory. "So, if a reward be offered for the apprehension of a culprit, or for the doing of any other lawful act, the promise, when made, is *nudum pactum*; but when any one, relying upon the promised reward, performs the condition, this is a good consideration for the previous promise, and it thereupon becomes binding on the promisor." And in *Morse vs. Bellows*, 7 N. Hamp. 549, the defendant was held liable on a promise to repay the plaintiff the amount which he should expend in the purchase of certain bonds, although the latter had made the purchase in question without giving notice of his assent to the contract, or of his intention to act in accordance with its terms. It was held, in like manner, in *Barnes vs. Perrine*, 9 Barb. 202, that a promise in consideration of the future performance of an act specified by the terms of the promise, becomes binding as soon as the act is done, although the promisee may not have bound himself to do it. But it is hardly necessary to cite authori-

ties, to a point which is sufficiently implied by the tenor of every precedent of a declaration in *assumpsit*, where the consideration is executory, and the pleader does not rely upon an averment of mutual promises. The whole question is, in fact, reduced to that of determining what is the consideration upon which the promisor has intended to make himself liable. Where it is merely executory, no instance can be found in which there has been required, either the averment or proof of any other assent on the part of the promisee, than is necessarily implied from the execution of the task, or the performance of the act, which is the express or implied condition or consideration of the promise which he seeks to enforce.

“Mutual assent is unquestionably necessary to give birth to an agreement, which cannot exist unless the minds of the parties have concurred in one object, and in the choice of the means necessary to attain it. But, while the assent of both parties is thus indispensable, it is far from being universally, or even generally true, that it must be signified or made known by one to the other. There is no better proof of assent to a promise, than compliance with its terms, and, if this be shown, nothing more can be necessary. All that is needed to render an engagement binding, is the fulfilment of the condition or consideration on which it is made, and, unless this requires notice, none will be requisite. Those who seek to enforce an agreement, must prove that it received their concurrence; but they need not ordinarily prove that it was known to the opposite party, and still less that he received any express or formal notification of its existence. Every man has a right to dictate the terms on which he will be bound, and should neither be compelled to accept less, nor allowed to exact anything more. Hence the duties and responsibilities of the promisee must be sought in the terms or conditions imposed by the promisor, and great care should be taken not to import other matters into the contract foreign to the purpose of the parties, and, therefore, likely to defeat their just expectations. The right of either party to notice, will consequently depend on whether what he has expressly or impliedly asked from the other, is of a nature to give him notice. There can be no reason why he should go beyond his own requisitions. These must,

however, unquestionably be fulfilled, and may be of a nature to impart that knowledge incidentally, which need not be given formally, or merely for the sake of communicating it. For, when one party promises on condition, or in consideration that the other will promise also, the promise thus asked, which is indispensably necessary to the completion of the contract, necessarily operates as notice that it has been completed. Thus, what is commonly called a proposition or offer, is, in fact, a promise to be bound, if the person to whom it is made will enter into a reciprocal and binding engagement. No contract can arise until it is accepted; or, in other words, until the engagement for which it stipulates, has been actually given. But this is not because an agreement cannot grow out of mutual assent, unless each of the parties knows that the other has assented, but because the promise made by one party is conditioned for a reciprocal promise by the other, and no contract can arise until the condition is fulfilled. A concurrent promise is, therefore, under these circumstances, indispensably necessary to the birth of the agreement, and its place cannot be filled even by performance. When, however, the promise, instead of stipulating for a reciprocal promise, merely stipulates for performance; or, in other words, where one party agrees to be bound if the other will perform, without requiring him to engage beforehand that he will do so; the latter may withhold his assent until the time comes for action, and then signify it by complying with the terms of the promise, without giving notice of his intention to comply with them. This is nothing more than the well settled principle, that an act done in pursuance of a prior request, will give a right to compensation, proportionate to the intrinsic or stipulated value of the act itself. Under such circumstances, the plaintiff may choose between two different modes of pleading, and may declare on a promise to pay if the defendant will perform, or on a request to perform, followed by an implied promise of payment. These modes of declaring are ordinarily convertible, and may be supported by the same evidence; for while a prior request generally implies a promise, a prior promise always operates as a request; *King vs. Sears*, 1 C. M. & R. 48; *Lamp-leigh vs. Brathwait*, Hobart, 125; 1 Smith's Leading Cases, 222, 224, 424, 5 Am. ed.

"It is, indeed, said in 1 Williams Saunders, 264, Note 1, and held in *De Zeng vs. Bailey*, 9 Wend. 288, that a declaration which avers that in consideration that the plaintiff would perform, the defendant promised to pay, must state the performance to have been on request; but it would seem plain, both in reason and on the authority of *King vs. Sears*, that a promise which unquestionably implies and constitutes a request in evidence, will have the same effect when alleged in pleading.

"Whichever, therefore, of these modes of declaring is adopted, proof of a promise on one side, and of compliance with its terms on the other, will be all sufficient; and no proof or allegation that notice was given of the intention to perform, will be necessary either to give birth to the obligation of the contract, or confer a right of action for its violation. The acts done, or the engagements made on the faith of the promise, may, indeed, be of such a nature as to operate as notice; but this result will not follow in every instance, and cannot happen in any until the contract is performed.

"To allege that notice of the intention to act under a guaranty, is necessary to render it binding, is, in fact, to allege that no executory contract can be valid unless founded upon mutual promises, and not upon an antecedent request on one side, followed by performance on the other; for, to make such a notice effectual as a means of information, it must bind the party by whom it is given, and preclude a subsequent change of purpose; or in other words, have the effect of a promise. It has always been held that a request, followed by performance, is sufficient to constitute a contract both in pleading and evidence, and the allegation of an antecedent promise necessarily implies an antecedent request. The law was so held in *Lent vs. Padelford*, 10 Mass. 280, where the objection taken to the declaration for want of mutuality, was overruled by the court, on the ground that where the consideration for the promise of the defendant is a future performance by the plaintiff, it is unnecessary to allege that the plaintiff promised to perform it.

"It is necessary to remember that the common law differs from the civil, and perhaps from every other system of jurisprudence, in requiring that every promise shall be accompanied by some express

or implied condition, without which it cannot be binding; and, in holding that a promise, thus conditioned on one side, and a fulfilment of its requisitions on the other, are the essential elements of a contract, and all-sufficient to give it validity. Thus, while the English cases, under the 4th section of the statute of frauds, decide that the whole agreement must appear in writing, and that when it does not, parol evidence is inadmissible to supply the deficiency, they also decide that the writing may be limited to the promise and the consideration; or in other words to what the promisor binds himself to do, and to the terms on which he is willing to be bound; and, that the assent, or the acceptance of the other party may be proved aliunde, which would seem to show that it forms no part of the contract. *Stadt vs. Lill*, 9 East. 348; *Powers vs. Fowler*, 4 Ellis & Blackburn, 511; *Moon vs. Campbell*, 10 Exchequer, 323. Hence, after the promise, and the condition or consideration on which it is based, have been proved by writing, all the rest may be left to unwritten evidence, which must follow the terms of the promise, and need not go beyond what those terms require. Thus, a recovery may be had on a written promise to guaranty the good conduct of a servant, if the plaintiff will employ him, or will promise to employ him, on proof in the one case of a promise to employ followed by employment, and in the other, of employment only, although neither promise nor employment appear in the writing, or are proved by written evidence. A written promise, said Crompton, J., in *Powers vs. Fowler*, that, "if you furnish goods hereafter to A. B., I will see you paid," does not contain anything binding the promisor to furnish the goods to A. B.; but if he does furnish them, there are cases to show that the guaranty is good." And he went on afterwards to say, that even when the writing is a mere offer,—that is, a promise on condition of a promise,—there is no reason why "the acceptance of the offer," or, in other words, the reciprocal promise for which the offer is conditioned, "should be in writing."

After a careful examination of certain of the cases which appear at first sight to establish a different conclusion, Judge Hare proceeds:

"The true rule on a question which has been needlessly complicated, was stated and followed in *Jackson vs. Yendes*, 7 Blackford, 526, where it was held that a proposition for a guaranty, must, like every other offer, be accepted; but, that an absolute promise to pay for such advances as another shall make, needs no acceptance, and will be binding on proof that the advances were made in pursuance of the promise. The same principle was laid down in *Williams vs. Collins*, 2 Law Repos. 580, and *Shewell vs. Knox*, 1 Devereux, 404; although the majority of the court would seem to have held, in *Shewell vs. Knox*, that a general letter of credit addressed to all who may choose to act upon it, must necessarily be construed as a mere offer or proposition, and consequently cannot be valid without acceptance.

"In deciding between the discordant cases which elucidate or perplex this branch of the subject, care must be taken not to lose sight of the distinctive features of the common law, and to preserve the judgment from influences drawn from other systems of jurisprudence, which differ from it in many essential particulars. The civil law agrees with the moral or natural law, in basing the obligation of contracts on the expectation created in the minds of those with whom they are made, and consequently requires that this should be made known to the promisor, unless he has waived or dispensed with such a communication. The engagement made by one party, and the assent of the other, constitute the contract, and give it legal as well as moral validity. Pardessus, Droit Commercial, Part 2, Tit. 1, Chap. 1, sect. 1, 141, 143; Pothier, Part 1, Chap. 1, sect. 1, art. 1, §§ 1, 2. The only deviation from this rule is in those cases, where the nature of the promise, or the circumstances under which it is given, render assent useless or superfluous, as when a promise is made for the purpose of inducing future resolve or action, and without any view to an immediate response or determination; Pothier, Part 1, § 2, art. 1. Thus, a promise to pay another, a sum of money, if he will cut down a tree, will be binding as soon as the tree is felled, without the aid of a promise to fell it, or any other proof or expression of assent, than the performance of the act for which the promise is conditioned. Here what is asked is not assent,

but compliance; the promisee is not required to bind himself by an obligation, and might refuse to do so if he were; and cannot assent until the time comes for action, otherwise than by saying that he will take the matter into consideration, which, if said, would be simply immaterial, and have no legal force or significance. We may, consequently, believe that where such promises are in question, which are placed by Pothier in a separate class or division, and described as "*obligations conditionnelles, potestatives*," the civil law agrees with the law of England, and holds the contract perfected by the performance of the condition. But, aside from this exception, acceptance is essential to the obligation, which is complete as soon as the promise is accepted, and derives no additional force from the acts or stipulations of the promisee. No consideration is necessary to constitute an agreement, although it may be defeated by a failure of the cause on or by which it is induced or founded, or by any error or mistake, which destroys the identity of its subject-matter, and thus prevents the minds of the parties from meeting on the same object.

"On the other hand, all engagements, however solemnly or formally made or accepted, are referred by the common law to the forum of conscience, unless they are sustained by a sufficient consideration, to bring them within the scope of a system which refuses compensation where there has been no actual loss, and makes the validity of promises depend, not on whether they have received the assent of the promisee, but on whether he has parted with value, or made stipulations on the faith of the expectations created by the promisor. The consent or concurrence of the parties in a common purpose is essential; mere assent not equally so; and the main question is, whether the terms or conditions of the promise have been fulfilled, and are sufficient to render it legally binding. Hence that which the civil law makes the exception, here becomes the rule: every promise is conditional, and derives its validity from the fulfilment of the condition, either at the time, or at a subsequent period. The promise may be what is commonly called an offer, that is an engagement to be bound if the other party will be bound also, or it may be in the form of a positive engagement to be bound absolutely,

upon and in case of performance, without exacting a reciprocal promise to perform. In either case, it is substantially the same, and depends for its force on the acts or stipulations of the promisee, without which it would be a *nudum pactum*, and want the legal obligation of a contract. The distinction between those promises, which are generally known as offers, and those which are commonly viewed as absolute, is consequently nominal rather than real; the only difference being, that the latter undertake for performance, if the promisee will perform, while the former exact an absolute promise of performance. It is indeed plain, that all contracts, however absolute, consist either in two conditional propositions or offers, which together constitute an unconditional agreement, or in a conditional promise, which has become absolute by the performance of the condition. Thus, a contract of sale grows out of an offer to buy, if the vendor will sell, and an offer to sell, if the vendee will buy; the condition on one side being payment, or a promise to pay, and on the other a transfer of the right of property, or a promise to transfer it, each of these engagements satisfying the requisitions of the other, and both together forming an absolute agreement. And on recurring to the classification adopted by the earlier pleaders, by whom declarations in assumpsit were reduced to form and method, we shall find all express contracts arranged under the two heads of promises, in consideration of promises, and promises in consideration of acts,—the one stipulating for performance, the other for an engagement to perform,—but both conditional, and depending for validity on the fulfilment of the condition. The action of assumpsit is, in fact, the earliest application of the wise and salutary principle, which, under the name of equitable estoppel, binds men, not by what they say or declare, but by what others do or promise on the faith of their declarations; and hence the right of suit devolved at common law, not on him to whom the promise was made, but on him who acted on the faith of the promise. *Edmondston vs. Penny*, 1 Barr, 394; *Crow vs. Rogers*, 1 Strange, 592; *Stewart vs. The Trustees of Hamilton College*, 1 Denio, 408; *Warren vs. Blatchelder*, 15 N. Hamp. 127; to *Depeau vs. Waddington*, 2 Am. Lead. Cas. Hence, while the pre-

cedents in which the science of pleading is embodied, require that all that the promisor has exacted, and all that the promisee has done in compliance with the exaction, should be set forth with the utmost precision, they contain nothing to justify the inference, that the assent of the one, or the communication of such assent to the other, is in any way material to the obligation of the promise, except in so far as both may result or be implied from what is stipulated or done in compliance with the terms of the promise. Pleading has always been regarded as the best test and criterion of legal principles, and that which finds no place in its forms and maxims can hardly be an integral part of the system of which it is the exponent.

“It is therefore plain, that the civil and common law differ in some important particulars, which must be kept in view in reasoning from one to the other. Mutual assent is the one and all-sufficient requisite under the civil law, which will in itself convert a promise into a contract; while all engagements derive their force at common law, not from the assent or acceptance of those with whom they are made, but from the injustice of allowing those who make them to violate stipulations on which others have acted; and hence no promise can be valid, unless it induces some act or forbearance, or some engagement to do or forbear, which must, moreover, be an exact fulfilment of the terms or conditions expressed by the promisor. The former system holds every promise binding which has been expressly or impliedly accepted by the promisee, but the latter requires first, a promise, next, that something shall be required in return, by the promisor, and finally, fulfilment or compliance on the part of the promisee. And while a condition is a mere accident, under the civil law, which may defeat the contract if broken, but gives no additional force when performed, it is essentially necessary, under the common law, as the connecting link between the engagement of the promisor and the acts or stipulations of the promisee, without which, the one could not serve as a consideration for the support of the other. Hence, while conditional promises form but one subdivision in the civil law, they are the only engagements known to the common law, under which every promise unaccompanied with a condition, must necessarily be destitute of a considera-

tion, and fail of effect unless sustained by a seal. Thus, the English decisions, under the fourth section of the Statute of Frauds, treat the promise and the consideration, as the essential elements of the agreement, and hold that both must appear in writing to give it validity, while the assent of the promisee may be proved by extrinsic evidence, when such proof is necessary. *Colgin vs. Henly*, 6 Leigh, *Moore vs. Campbell*, 10 Excheq. 323; *Stadt vs. Lill*, 9 East, 248; 1 Smith's Leading Cases, 373, 5th Am. Ed.

"This course of decisions results necessarily from the rules of the common law, which make a consideration necessary to give force to a contract; for, as the consideration can only arise from the exact fulfilment of the terms or conditions imposed by the promisor, these form an essential part of the promise itself; without which it would be impossible to trace the connection between the consideration and the promise, or to know that what the promisee has done, is that which the promisor required. In other words, that must appear in the promise as its condition, which will, when fulfilled, enure as its consideration, and thus give it force and validity as a contract."

We do not know that this view of the conditional character of promises at common law has been elsewhere advanced. It certainly furnishes a satisfactory clue to the explanation of many discrepancies between the doctrines of our own and the Roman law, on the subject of contracts. That in the one, a promise, when deliberately made upon a sufficient motive, is binding, while in the other, something further, in the shape of a consideration, is required, cannot be doubted. It is true, that promissory notes and the obligation of the acceptor of a bill of exchange, are absolute and not conditional engagements, but they are innovations in the common law, and exceptions to its rules. No other instance, we believe, can be put, of a parol promise enforceable at common law, *proprio vigore*, and independent of any act on the part of the promisee in fulfilment of some precedent condition, express or implied.

It may be proper to state in conclusion, by way of explanation of the term *obligation conditionnelle potestative*, that conditions, whether annexed to contracts or testamentary dispositions, are among other divisions, distinguished by the writers on the Roman law,

into *casuales*, *potestativæ* and *mixtæ*. The first of these comprehend conditions whose fulfilment depends solely on chance or the operation of natural laws, or the will of a third person ; the second, conditions whose performance depends solely on the will of the creditor or party to be benefited ; and the third, by its name, denotes conditions where fulfilment or performance depends partly on one and partly on the other.¹

RECENT AMERICAN DECISIONS.

United States Circuit Court for the District of New Jersey.

JOHN M. MARTIN vs. THE SOMERVILLE WATER POWER COMPANY AND OTHERS.

1. The present constitution of New Jersey limits the powers of the legislature, and separates them from those of the judiciary, and adopts the prohibitions of the constitution of the United States against laws impairing the obligations of contracts, and further prohibits the depriving a party of any remedy for enforcing a contract which existed when the contract was made. Hence,
2. Where the legislature passed an act for the relief of the creditors of a manufacturing corporation, providing that certain persons should be authorized to sell all property mortgaged for the payment of bonds, at public sale to the highest bidder, *free from all incumbrances*, and after paying certain expenses and costs, to distribute the proceeds to the corporation's creditors according to the priorities of their several liens, it was held that such legislation was unconstitutional by reason of its impairing the obligation of the contract between the mortgagors and the mortgagees, and depriving the mortgagees of a remedy which existed at the time the contract was made.

In this case the constitutionality of certain acts of the legislature of New Jersey, which authorized the sale of the property of the company free and clear of all prior incumbrances, was argued at the last term of the court held at Trenton by S. B. Ransom, Esq.,

¹ Mühlenbruch Doct. Pand. vol. I, § 106 ; Mackeldey, § 179 ; Lindley's Introd. § 88.

and the complainant in person, for the complainant, and by the *Hon. William L. Dayton* and *A. O. Zabriskie, Esq.*, for the defendants.

In 1848, the Somerville Water Power Company, incorporated by the legislature of New Jersey, being indebted in the sum of \$50,000 to certain creditors in New York and Connecticut for moneys advanced to the company, issued one hundred negotiable bonds for \$500 each, payable in 1853, with interest, and delivered ninety-six of them to such creditors in part payment of the company's indebtedness.

To secure the payment of these bonds, the company mortgaged all its real estate, franchises, water power, and property at Somerville to the present chancellor and two other well known gentlemen of New Jersey, as trustees for the holders of the bonds.

Many of these bonds were sold in the New York market, and the complainant became the owner of a part of them, for value. In the meanwhile, the company having become embarrassed, transferred and merged itself into another corporation of New Jersey, called the Hudson Manufacturing Company, and the trustees transferred the mortgage to the last company, subject to the rights of the bondholders under it.

At length both companies became so embarrassed, and their property so encumbered by judgments, decrees, sheriffs' sales and injunctions, that it was deemed almost impossible to make a title thereto, by means of regular legal proceedings in the State courts, and the legislature was resorted to for aid.

Accordingly, an act was passed in the winter of 1856 "to relieve the creditors and stockholders of the Somerville Water Power Company and of the Hudson Manufacturing Company," and also a supplementary act, by which certain persons therein named were authorized to sell the whole of the mortgaged property at public sale, to the highest bidder, *free from all incumbrances*, and after paying expenses and certain costs, to distribute the proceeds amongst the creditors, according to the priorities of their several liens. In May following, the property, which had been valued at \$150,000, was knocked down at \$50,000.

In this stage of the proceedings, the complainant, knowing that the sum for which the property was sold would not pay the amount secured by the mortgage and interest, and believing that the property at a fair sale under a decree of foreclosure would sell for more than enough for that purpose, filed his bill in the federal court for the foreclosure of the \$50,000 mortgage, and praying that the acts in question be decreed unconstitutional and void, on the ground that they were in violation of the obligation of the contract between the bondholders and the Somerville Water Company, and repugnant to the constitutions of the United States and of the State of New Jersey.

The question came up on demurrer to the complainant's bill, and was decided for the complainant, the court holding the acts unconstitutional and void, and granting a perpetual injunction against all proceedings under them.

The opinion of the court was delivered by

GRIER, J.—The demurrer to the bill in this case has been entered for the purpose of having a final hearing and judgment of the court on the validity of the act of the legislature of New Jersey, authorizing the receiver to sell the premises in question free and discharged from the lien and estate of the mortgagees.

It is contended that this legislation is forbidden both by the constitution of the State and that of the United States.

Previous to the 29th of June, 1844, the State of New Jersey was governed by the old colonial constitution, adopted on the 2d of July, 1776. This contained no bill of rights nor any clear limitation of the powers of the legislature. The history of New Jersey legislation exhibits a long list of private acts and anomalous legislation on the affairs of individuals, assuming control over wills, deeds, partitions, trusts, and other subjects usually coming under the jurisdiction of courts of law or equity; consequently the decisions of the courts of New Jersey of questions arising under the old constitution cannot be cited as precedents applicable to the present one, which carefully defines and limits the powers entrusted to the legislature, the execu-

tive, and the judiciary. It is very desirable that the constitution of a State should be construed by its own tribunals, and we regret that the researches of counsel have not furnished us with such precedents. The case of *Potts vs. The Delaware Water Power Company*, 1 Stockton, 592, has reference to an act passed before the adoption of the present constitution. That act was declared by the court "not to impair the obligation of any contract," and to be remedial only. The first mortgagees gave their assent to the sales made under it, and others could not object to it as made without their authority. In this important respect it differs from the present case, and cannot be relied on as a precedent.

The validity of this act has been challenged on several grounds. If found invalid on any one, we need not examine the others.

The constitution of New Jersey has not only carefully limited the powers of the legislature, and separated them from those of the judiciary, but it adopts the prohibitions of the Constitution of the United States against *ex post facto* laws, and laws impairing the obligations of contracts, and with this addition, "or depriving a party of any remedy for enforcing a contract which existed when the contract was made."

It is not contended that the act comes under the category of an "*ex post facto* law;" and if it be merely remedial in its character, as defendants contend, there can be no valid objection to it under this head of the constitution.

Does it impair the obligation of the contract between the mortgagees and mortgagors, or deprive the mortgagees of any remedy which existed when the contract was made?

The act and supplement must be construed together as forming one act. It is entitled "An Act to relieve the creditors and stockholders of the Somerville Water Power Company," &c. It sets forth in its preamble certain representations made, no doubt, by those who procured the act, showing plausible reasons for such legislative interference. But the validity of the act must be judged from its actual operation on the rights of parties subjected to it, and not by the pretences put forth by the preamble. This may show that the legislature acted in good faith, and believing that their in-

terference would wrong no one, but not that such was the actual result. Legislators cannot be too cautious when asked to interfere by special legislation for particular persons or particular cases, on *ex parte* representations. They cannot call all parties before them and judge upon a full hearing—this is for the courts. Their action may not always be unjust, but it may and often is tyrannical and injurious.

Let us inquire what is the contract, and how is it affected by this act?

The mortgagees of this property held the legal title in trust for the several bondholders who may properly be treated as the real mortgagees. They may be said, in common parlance, to have a "lien" or "security" on the property mortgaged, but they have it by force of their legal title to the property. It is an estate in fee simple, defeasible only by payment of the debt. When the condition of the obligation is broken, the mortgagees may enter on the premises and recover the rents, issues, and profits thereof, till their debt is satisfied. If they see fit, they may appoint an agent or attorney, who may enter on the land under their direction and make sale of the same in satisfaction of the debt. The disposal of the mortgaged premises is to be made according to the discretion and judgment of the mortgagees, and not of another. No subsequent incumbrancer or assignee of the equity of redemption can divest their estate contrary to their will, unless by a tender of the debt due. They cannot be compelled, to suit the convenience of others, to put up the property to sale, at a time or in a manner which might lessen or injure their security.

Now, by this contract the estate of the mortgagees is defeasible only by payment of the debt. But this act permits the receiver to dispose of their estate, and does not provide that the debt shall be first fully paid. It permits the receiver to sell for any sum, whether it be sufficient for such purpose or not, and the receiver has made a contract of sale for a sum insufficient by many thousands of dollars. This is making a new contract for the parties and impairing the obligation of the mortgage. It may be truly said "'tis not so written in the bond." The mortgagees may dispose of their secu-

ity for less than the amount of their debt, but no other person can.

2d. The obligation of this contract is moreover impaired by this act, in that it gives a precedence to certain indefinite costs and charges, (not costs of the sale merely,) to be paid out of the proceeds of the property before the mortgage debt. This is in direct contravention of the contract by which the estate was conveyed to the mortgagees, free from all charges and incumbrances.

3d. The mortgagees had by their contract a remedy, to be used at their own option and discretion, as to time and mode of sale ; and by law, they had the remedy of entry on the premises, and receiving the rents and profits. This act deprives them of both, contrary to the letter of the constitution of New Jersey, without invoking the aid of the cases of *Bronson* agt. *Kinzie*, 1 Howard, 311, and *McCracken* agt. *Haywood*, 2 Howard, 611.

We have not thought it necessary to review the very numerous cases on the subject, or to attempt any metaphysical definition of what constitutes "the obligation of a contract," as it is clear that any legislation which defeats the estate of the mortgagee without payment or tender of the whole debt due on the bonds, which gives a preference to posterior liens, and which deprives the mortgagee of his remedy given by the covenants of his contract, as also that given by the law of the land, "impairs its obligation," and is contrary to the letter and spirit of the constitution of New Jersey. This act may be remedial as to the owners of the equity of redemption and those having liens against it, but the mortgagees have a right to say, *non in haec foedera veni*. We have never agreed to have our estate defeated to suit the convenience of others.

The complainant is entitled to a decree making the injunction perpetual—but the defendants have leave to answer as to the other charges of the bill.

In the United States Court, in Admiralty, South Carolina District.

TUNNO ET AL. vs. THE BETSINA.

1. A dissenting part owner is entitled to a stipulation to secure his interest in case of a loss on a voyage undertaken against his wishes.
2. The court of admiralty will not order an account as a separate and independent mode of relief, but only as incident to other matter of which it has admitted cognizance.
3. In the management of a vessel the opinion of the majority shall prevail, unless it forbids its employment, in which case it yields to the minority, who desire its employment, because the public interest must be protected in securing employment to the vessel.
4. The court of admiralty has an admitted jurisdiction to secure the value of the dissentient minority's interest, in case of disagreement among part owners in the employment of the vessel.
5. The foreign authorities with regard to the employment and sale of a vessel in case of disagreement among joint owners, collected and commented on.

Libel for stipulation, account, and sale.

Petigru & King, Proctors for libellants.

Brown & Porter, Proctors for respondent.

The opinion of the court was delivered by

MAGRATH, J.—The libel in this case asks the aid of the court in three modes of relief: first, in a stipulation from the other part owners for the return of the vessel; second, in having an account taken of her earnings; third, in a decree for sale, upon two grounds: 1st, an irreconcilable disagreement among the owners, as to the mode in which the vessel should be employed; 2dly, misrepresentation in inducing the libellant to become the purchaser of the shares now owned by him in this vessel.

The application for the stipulation, intended to secure the interest of a dissenting part owner, in case of a loss in a voyage undertaken against his wishes, has now become a familiar subject for the exercise of admiralty jurisdiction. He who is unwilling that a vessel shall proceed on a given voyage, may give notice thereof to his co-owners; and in case of loss he cannot be made liable to contribute, Abbott, 125, or he may apply to this court, and will be entitled to a stipulation, by which, in the event of loss, they shall be bound to

him for the value of his share, *Id.* So much of the prayer in the libel as relates to the stipulation has therefore been granted. It may not be improper for me to say, that the stipulation, in such matters, is in its nature provisional. It is not treated nor allowed as a continuing, permanent arrangement, by which the rights of an owner are protected and preserved; but simply as a present measure of relief, afforded in a particular case, for a particular voyage. And when the application for it is regularly made, it then is apparent that a fixed discordance has arisen between the owners, which would seem to call for the exercise of some relief to be adopted, either by them or for them, more perfect and enduring.

In relation to the account which is prayed for, it is, in this branch of the case, sufficient for me to say, that considered in itself as a separate and independent mode of relief, it cannot be obtained in the admiralty. *Steamboat Orleans vs. Phæbus*, 11 Pet. 175; *Min-turn vs. Maynard*, 17 How. 477. An account will be ordered as an incident of other matters concerning which the court has admitted cognizance. *Davis vs. Child*, *Davei's Rep.* 71. In this case, therefore, the question for an account depends on another question involving the sale prayed for. If a sale can be ordered, then, before the court can divide the proceeds, the mutual accounts of the co-owners must properly be entertained and adjusted, in making a just distribution. *Andrews vs. Wall*, 3 How. 568.

The question of the power of this court to order a sale, in a case of disagreement among part owners, has been, and is still, in some respects, a matter of equal importance and doubt. In coming to that conclusion which I shall now announce, it is fitting that with it I should state the reasons which have guided and governed me.

In Great Britain, the power of the admiralty to order a sale among part owners, in case of disagreement, has been hitherto stoutly denied. The case of *Ousten vs. Hebden*, 1 Wilson, 101, is cited as the direct authority for the opinion that the admiralty cannot compel a sale of a ship, on the application of a part owner who objects to a certain voyage; and Lord Stowell, in the *Apollo*, 1 Hagg. 306, speaking of the stipulation, has declared that "beyond this limit, the court has not moved."

But it aids us very little to determine satisfactorily, the true nature and extent of the admiralty and maritime jurisdiction in the courts of the United States, to refer to the opinions of the courts in Great Britain. In the first place, it is now generally conceded, that the jurisdiction of this court, intended to be exercised in the United States, is not limited, as it was known in Great Britain anterior to the revolution, and as declared by the courts of that kingdom. *De Lovio vs. Boit*, 2 Gall. 400; *Propeller Genesee Chief vs. Fitzhugh*, 12 How. 443.

In the next place, it is not always that we can be certain, that even in the judgments of these courts, will we find a reliable exposition of the powers which have been admitted to belong to this jurisdiction. In Great Britain, the right of the admiralty to order a stipulation is now undoubted; yet in the Court of King's Bench, Chief Justice Holt held that the practice was unlawful; and by others the exercise of the jurisdiction was considered an assumption. *Abbott*, 125. No one familiar with the acrimonious controversy which was carried on in Great Britain, and had for its object the suppression of the admiralty, and who recalls the disadvantages under which the admiralty contended, will hesitate in understanding why a judge so eminent as Lord Stowell should acknowledge the abstemiousness with which the admiralty always proceeded in the exercise of its jurisdiction.

Under the influence of this feeling, the admiralty in Great Britain, in its entertainment of all cases relating to the possession of vessels, has discriminated by separating such questions, into possessory, where the mere fact of possession was concerned; and petitory, in which a question of title was involved. In the former class, exercising, and in the latter, refusing the exercise of its jurisdiction. But in the United States, the distinction between these classes of cases has never been recognized, and courts of admiralty from the earliest period, in this country, have entertained jurisdiction in cases involving not only the question of possession, but that of title also. *The Tilton*, 5 Mason, 468. It need scarcely be observed that in this they exercised a familiar jurisdiction which would not have been attempted by a judge holding admiralty jurisdiction in

Great Britain. In like manner in the United States, although a mortgage of a vessel has been held not to be a marine contract or hypothecation; and on that ground not to be foreclosed in the admiralty, *Bogart vs. The John Jay*, 17 How. 399, yet the right of the mortgagee to intervene in the admiralty, if the vessel was within the jurisdiction of the court, has been always maintained. *Andrews vs. Wall*, 3 How. 568. But in England, proceeding from the same doubt of the right of the court to interfere in a question where title was even indirectly involved, a mortgagee could not intervene in behalf of his interest, until by the 3 and 4 Vict. c. 65, §. 3, special authority is given to the admiralty to entertain jurisdiction in such cases, Abbott, 130.

While, then, the enactment of the British Parliament may be relied on as showing that until its passage there was in the court of admiralty of that kingdom no authority to adjudicate a question concerning a vessel in which title is involved, at the same time we are able to see that the courts of the United States, by the exercise of the same jurisdiction without any corresponding legislative provision, very plainly indicated their opinion that a question affecting the title was not *per se* beyond their jurisdiction.

We are then enabled, in opening our examination of the question here to be decided, to start with two principles of admitted admiralty jurisdiction in the United States. 1st, that disagreement among part owners as to the employment of a vessel is a ground for the interference of this court, admittedly so far as may be necessary to secure to the dissentient minority the value of their interest; and 2d, that in rejecting any distinction between the possessory and petitory proceedings, a jurisdiction was affirmed, although a question of title might be involved.

It is well, also, to be borne in mind, that in the case of *Ousten vs. Hebdon*, the question of a sale was not before the court. The application related solely to a stipulation, and the opinion of Chief Justice Holt, is in fact, little more than *obiter dictum*: Abbott, 126, note.

Unquestionably, in the administration of admiralty and maritime jurisdiction in Great Britain and the United States, this marked

difference exists in the sources from which the law is derived, as administered by each. In Great Britain the jurisdiction of the court is determined, partly by legislation—by conferences among the judges—and the opinions of judges of the King's Bench, in cases before it, in which applications were made for a prohibition against the exercise of admiralty jurisdiction in some particular case. And we are constantly reminded that reference is not made to the maritime law of the world, to determine whether a case can be adjudicated by a tribunal created originally for the administration of that jurisprudence, but to another tribunal not superior, but equal, animated with a jealous rivalry equally unreasonable and unyielding. *Davis & Brooks vs. The Seneca*, 18 Am. Jur. 490. It is true, that the popular objection derived from the *non obstante statuto* clause in the admiralty commission, was rightfully one which, in a government resting upon popular principles, should be watched, and indeed should be exploded. But the legitimate consequence of the argument from this, used against the admiralty, should have been extended to, and embraced the king himself. Under the republican government of England, a juster sense of the mode in which the admiralty jurisdiction should be administered, seems to have been adopted; and the rule was then laid down, that matters submitted to it, should be determined "according to the laws and customs of the sea;" but this rule expired with the republican government, and was not re-enacted after the Restoration. Hall's Ad. Pr. 26; Benedict's Adml. 54.

Considered then in this light, the great argument against the exercise of this or any other power, derived from the "abstemiousness" of the admiralty in Great Britain, to borrow the language of Lord Stowell, loses much of the force it would otherwise possess. We are not at liberty to consider the conduct of the admiralty courts in Great Britain, as the evidence of such a jurisdiction being inconsistent with the limits which should be here assigned to it. And are forced, in this, as in many other questions, to seek other sources of information, in enabling us to decide whether the power is properly to be exercised or not.

I shall, therefore, proceed to examine and ascertain, so far as it

can be done with the sources of information within my reach, the maritime law in relation to the employment and sale of a vessel. In the marine ordinance of Louis 14th, it is thus laid down, sec. 5. "En tout ce qui concerne l'interest commun des proprietaires, l'avis du plus grand nombre sera suivy; et sera, repute le plus grand nombre, celuy des interressey qui auront sa plus grande part au vaisseau. Sec.6. Aucun ne pourra contraindre son associate de proceder a la licitation, d'un navire commun, si ce, n'est que les avis soient egallement partages sur l'enterprize de quelque voyage." Pardessus, 4, 356; Coll. de Lois Mar.

In the Consulat de la Mer, 2 Pard. 62, 63, 64, 65, and c. 10 and 11, there is more detail preserved in the statement of the rule, and the reason for it. It is there laid down that no one shall sell his share or interest in a vessel until she has completed her first voyage, and this is said to arise from a consideration of what was due to the captain. He was obliged to have a certain interest in the vessel, had all the trouble and care of her construction, and would be unprotected if his rights were left to his co-owners, who were influenced "par legerete de conduite, ou parce qu'ils sont riches." But when that voyage was ended, a larger part of the owners could have the vessel sold, nor could the master oppose it, unless there had been some special agreement entered into, on the subject. And this sale so proceeding according to the wish of the majority, is stated upon the principle, "qu'en quelque chose, que ce soit, ou une discordance d'avis se manifeste, la volonte de la majorite l'emporte." But these provisions seemed intended for the case of all, or a majority, (tous ou bien la majeure partie,) of the part owners; it appears, however, that the captain had his correlative rights. "Le patron a autant de droits pour forcer a la licitation les actionnaires que ceux-ci en ont envers lui."

These provisions generally were adopted in the Code de Commerce: sec. 220, liv. 2, tit. 3. "En tout ce qui concerne l'interest commun des proprietaires d'un navire, l'avis de la majorite est suivi. La majorite se determine par une portion d'interest dans le navire, excédant la moietie de sa valeur. La licitation du navire ne peut etre accordée que sur la demande des proprietaires formant ensem-

ble la moitié de l'interet total dans le navire, s'il n'y a par ecrit, convention contraire."

In the law of the Hanse Towns, Droit Maritime de la Ligue Anseatique, 2 Pard. 527, there is no provision concerning a sale in case of disagreement. The proceeding is declared to be such as conforms "a l'ancien usage, qui etablit que ceux qui auront la moindre part, et le moins de voix, suivront l'avis de la majorite." (Section 57.) It is, however, also provided in this code, that "if the master to displease his owners, (par animosite,) sells his part of the ship for more than it is worth, they shall have the right to take it at such valuation as arbitrators shall put upon it." (Section 54,) Id.

In the note of Roccus, translated by Mr. Ingersoll, it is said, (note 47,) in "maritime controversies, the general maritime law is to be the rule of decision, provided it be not contrary to the law of the land." There is no express provision concerning a sale, but in the 6th note it is provided that if a ship has two owners, and both choose a captain, the judge shall decide between them; and "if the judge cannot effect a concurrence, the ship must remain without a commander, until a concurrent appointment can be made;" and in note 49, "if a controversy arise among several owners of a vessel, respecting different offers made for chartering a ship, he is preferred who offers the highest freight, and if the freights offered are equal, the judge will make the election to determine the dispute."

In 1793, in the United States Court in this State, Bee's Ad. 2, an application was made to Judge Bee for a sale of the sloop Hope, to make a division; and the application would appear to have been rested upon the apprehension of some fraudulent conduct, intended by the other part owner. The report of the case is brief, and far from satisfactory, nor can I find any authority in the admiralty for ordering a sale under the circumstances of the case, as they can be gathered from the report. There was enough, in all probability, to warrant a court of equity to interfere, and that court often exercises its authority auxiliary to a court of admiralty, as in the matter of a stipulation where the value of the vessel is uncertain. After much reflection, I cannot recognize this case, as determining a ques-

tion of disputed jurisdiction, with all the respect I have for the learned judge by whom it was decided.

In 1800, in Pennsylvania, the case of *Wellings vs. Blight*, 2 Pet. Ad. 288, was decided by Judge Peters. In this case, the learned judge expresses an opinion as to the power of the court to order a sale; but the application in the case was not for a sale, but to be allowed to give a stipulation that the ship might proceed on her voyage. And the opinion so given as to the sale, seems rested on the Sea Laws, 442, and Beawes' *Lex Mercatoria*, 49. These authorities, the latter particularly, I shall refer to hereafter. The reference to the marine ordinances of France, does not appear to have been made, except incidentally, and instead of making a decree for a sale, the learned judge declares that, "a privation of freight, the fruit and crop of shipping, seems therefore to be the appropriate mulct on indolent, perverse, or negligent part owners."

In 1828, in Pennsylvania, the question again arose in the case of *Davis & Brooks vs. The Seneca*, Gilpin, 10, before Judge Hopkinson. The libellants were owners of one-half the brig. The other half of the brig was owned by the captain, who kept possession of her. The case, in fact, was one of disagreement between owners of equal shares as to the best employment of the vessel. Judge Hopkinson refused the sale, and an appeal was taken to Judge Washington, who reversed the circuit decree, and ordered the sale. 18 Am. Jurist, 490. Judge Washington rested his judgment upon two leading principles: 1st. That in determining admiralty jurisdiction we must not be confined to the restrictions which in Great Britain have been adopted, but should refer to the general maritime law. 2d. That in making such a reference, the provision in the marine ordinances of France which provide for a sale, where a half or a larger interest desire it, was to be regarded as laying down a wise and salutary rule of the general maritime law, which he would enforce as the maritime law of the United States. No further proceedings by way of appeal were taken in this case.

The opinion of Judge Washington, by an able commentator, is said to have "the support of the most eminent authority," and to express "the rule of American law." *Flanders on Shipping*, 372.

In the case of *the Steamboat Orleans vs. Phœbus*, 11 Pet. 175, Judge Story declared that "the jurisdiction of courts of admiralty in cases of part owners having *unequal* interests or shares, is not, and never has been applied to a direct sale, upon any dispute between them as to the trade and navigation of a ship engaged in maritime voyages." Nor do I understand him—although he is referred to as having done so—(Collyer, 996, in note,) as extending the jurisdiction at any time farther than the case of an equal division among the owners, in relation to the employment of the vessel. Story on Part. sec. 439. Although the title by which a vessel is held is not subject to the general law of a partnership, by which each partner has the power of disposition over the property of the concern; but instead of this, each stands to his associates in the relation of a tenant in common, with a perfect right to dispose of his own share, without affecting the shares of his co-owners; yet that general principle in all voluntary associations, by which the opinion of the majority controls in whatever relates to the subject matter of the common property, must still be recognized as applicable to the ownership in vessels. In the references which I have made to the established sources of the maritime law in Europe, it will be seen, that this, to me, seemingly necessary authority in the majority, is everywhere recognized as a part of the fundamental law. How far the practice, adopted at a very early day in Great Britain, of qualifying the right of the majority by a stipulation for the benefit of the minority, is adopted among continental courts in the exercise of admiralty jurisdiction, it is not easy to ascertain; but in Great Britain and in the United States, it is now recognized as an appropriate exercise of admiralty jurisdiction, and a proper condition to be imposed upon the general authority vested in the majority of the part owners for their employment of a vessel, against the wishes of the minority.

The right of the majority to employ a vessel, against the wish of a minority desiring some other voyage, subject to the condition of giving a stipulation, is then clear, and the right of the majority to employ a vessel against the wish of a minority not desiring any employment of the vessel, is equally clear, subject to the same condi-

tion. The source of the right is in the fact of there being a majority in interest who favor the employment; but superadded to it, is another reason, derived from the considerations of public policy, and which is said to require the employment of vessels. Whether in the case where a majority desiring the employment of a vessel, a minority not desiring any employment, and that majority unable to make a sufficient stipulation; considerations of public policy would override the condition for the stipulation, or the latter will be preserved to the suppression of the former, and the destruction of the vessel, is a question yet to be decided; and upon its decision depends the decision of another question, which is, whether the order for a stipulation is a matter of right, or subject in any degree to the discretion of the court. If the order for the stipulation be a matter of right, then it may be, that the inability of the majority to give it, might present the case of the vessel rotting in her dock. "The right, (says Judge Story, Part. sec. 439,) to order a sale of property subject to its jurisdiction, is clearly a matter within the competency of a court of admiralty, and indeed is familiar in practice, in order to prevent irreparable mischief, or impending losses." But conceding this to be so, as of course it must be, upon the familiar principle that a court has the power to preserve the subject of its jurisdiction *pendente lite*, yet it does not aid us in resolving the doubt, for the propositions stand to each other in this position; if the power of sale is in the court, (in case of irreparable mischief or impending loss,) it is because the case and the thing to which the case relates, is within its jurisdiction, and if the case is subject to its jurisdiction the power of sale (in the cases stated in the text) is necessarily in the court. The solution of either will determine the other, but neither or both decide the real question, whether a power in the admiralty to decree the sale of a vessel, as a substantive power, is or not, within its jurisdiction.

I have had occasion to refer to the article in the marine ordinances of Louis 14th, which provides that in everything which concerns the common interest of the owners, the opinion of the greater number will prevail; and farther, that, that shall be reputed the greater number which represents the larger interest. By this, the

major part may employ the vessel in a certain voyage, by the mere fact of being the major part, though the minority object, 1 Valin's Com. 582, and such is the law in England, with the qualification of a stipulation for the minority, Beawes, 45; Molloy, 61, c. 1, 220. But if the major part do not desire to employ the vessel, but the minority do so desire, what then shall be the rule? According to the marine ordinances of Louis 14th, in this question, as in others, the rule of the majority prevailed; and if they so desired it the vessel would remain unemployed, 1 Valin's Com. 582. But in England the rule would seem to be different, for it is laid down, that if but one is left for the voyage, yet the same right to employ the vessel, subject of course to the stipulation, shall be with him, Molloy, 220. To this is added, in the text, the seeming qualification, "especially if there be equality in the partnership," p. 120. On the other hand, Beawes lays it down, that if the greatest part refuse to fit out the vessel, they shall not be compelled on account of their majority, but the ship shall be valued and sold. Beawes Lex. Merc. 49. Cleirac, as cited by Valin, 582, declares, that if two citizens own a ship, the one who wishes to navigate or employ; (*l'un d'iceux vent qu'il navigue,*) and the other opposes, the right of him who wishes to navigate shall prevail. To the same effect, is Kuricke, *sur le droit Hanseatique*, 759, cited in Valin *ut sup.* "*Certe eum prevalere debere qui navim navigare, quam otiosam domi manere mavult.*" And to these follow Strachha *de navibus*, cited also in Valin, and who rests upon the principle that in association their wish should be consulted, who desire to employ a vessel in that use for which she was constructed. And the same conclusion, as to the right of the minority in such a case, was adopted by the Supreme Court of the United States. *Steamboat Orleans vs. Phœbus*, 11 Pet. 175.

I do not find the rule as laid down in Beawes, in the case of the refusal of a majority to employ the vessel, so expressed in any other authority. By the French law, the opinion of the majority would prevail, and the minority would have to submit. But according to Molloy, if the major part refuse to employ the ship, the minority shall have the privilege of employing her on the same terms which would have been imposed on the majority, that is, giving a stipula-

tion for the shares of the dissenting part owners, in case of loss, and in this, concur Cleirac, Kuricke, Straccha, and Judge Story.

If we come to a closer examination and summary of the general maritime law upon this question, we shall arrive at these results: A vessel, although the subject of private ownership, is regarded as a matter also of public interest. The public interest is protected in securing the employment of the vessel. In the management of a vessel, the opinion of the majority in value shall prevail, unless it forbids its employment, in which case it yields to the minority desiring its employment. The sale of a vessel is not encouraged, because the interference of the court in aiding a discontented part owner to force a sale, would in many cases serve only to gratify caprice or passion, tend to the injury of other part owners, and invite frequent and injurious interruptions of commercial operations. In case of disagreement between part owners who have an equal interest concerning the employment of the vessel, a sale will be ordered, but such disagreement must not be upon the question of employment or not, for in such case, they who desire to employ, shall prevail, but it must be a disagreement as to the manner in which the vessel shall be employed.

It seems to me that in these cases of disagreement among part owners, to which branch of the general question I confine myself, the admiralty will decree a sale; if beyond these, a sale will be ordered, it must depend upon some special considerations connected with a certain case out of which no general rule can be framed. In the first of these cases, a sale will be ordered, because it is impracticable to decide the differences between the owners by the application of any other principle of the maritime law. In the second case, because by the application of the general rule of the maritime law, injury may ensue. In the third case, because it carries into execution a fundamental rule of the maritime law. The first case is illustrated by a disagreement between owners equal in interest, and both desiring to employ the vessel; here it will be seen that the rule respecting the wish of the majority cannot prevail for they are equally divided, nor can you decide this difference by the rule which gives the preference to such as wish to employ the vessel for both de-

sire to do so. It is obvious, then, that as no ground exists for the preference of one over the other, a sale is necessary. The second case is illustrated by what has been already hypothetically stated, where the minority do not wish to employ the vessel, but the majority who wish to employ the vessel, cannot give a sufficient stipulation. If the court cannot exercise a discretion in dispensing with the stipulation—and it would seem as if it were a matter of right which, demanded by the minority, cannot be refused—then a sale would also be necessary to prevent the destruction of the property. The third case, is where a majority in value showing it to be for the general good, ask for a sale; and in granting it the principle is recognized that the opinion of the majority in value shall prevail, which by the *Consulat de la Mer* is specially applied to a sale.

Nor should it be forgotten, that when these principles of maritime law were laid down, a greater necessity existed for the exercise by the court of the power to sell than can now be presented. Then a restraint was imposed upon the exercise of the owner's right to sell, in some cases until a voyage was performed, in others until the expiration of a certain period of time. During the period when the right of the owner was thus controlled, a necessity would seem to exist for a power in the court to order a sale, but I find it nowhere affirmed. But now the owner may at any time, to any person, and for any price, dispose of the vessel, or his share, and consequently no corresponding necessity exists from considerations of what is due to private rights. It is true, that in former days vessels were rather regarded as the means by which trade was encouraged and commerce sustained, than as in themselves objects of trade as any other kind of property. And this serves to explain the stringency of the rules by which they were managed. But the unrestricted power of disposition which now is exercised by every owner, provides a remedy for perhaps most cases of irreconcilable disagreement. Doubtless there are cases in which the exercise of this power would be attended with disadvantage, but such a consequence may result in any case where one having joined an association, sells his interest and retires. If the disadvantage is produced or enhanced by his associates, or in any other way invites the interfer-

ence of the court, it will be afforded. If within the jurisdiction of the admiralty, it will give the proper relief. If not within the jurisdiction of the admiralty, a court of equity will be found adequate to the occasion, proper for the exercise of its authority.

I consider that the power to sell, as exercised by Judge Washington, in the case of *The Seneca*, was carried as far as the best authorities in the maritime law will warrant. Nor is it easy to comprehend for what useful purpose the power could be exercised, in any other cases than such as I have referred to, in which a disagreement between part owners cannot be determined by the operation of principles applicable to associated ownership, or such as are specially provided for an ownership in vessels. Of what use would be the principle which affirms the control resulting to a majority from the fact of its being so, if in any case in which it was to be applied, a court would be asked to decree a sale? It would soon be that the only mode for preventing a dissolution, would be for the majority to render unquestioning accord to the wishes of the minority; no matter how small that minority, or unreasonable its exactions.

In this case, the libellant is not the owner of a-half of the vessel. He represents a minority in value. And the examination now made satisfies me that he is not entitled to a decree for a sale on the ground of disagreement with the other part owners as to the best mode of employing the vessel owned by them in common.

The second ground upon which the libellant asks a sale, is that he became the purchaser of the share now owned by him in the vessel under certain representations made to him as to the employment of the vessel; that these have not been fulfilled, and the neglect has been productive of injury to him. This is no ground for a sale. If the representations were all that the libellant considers them, and if they were connected with it and affected the other part owners as if made by them, it would be a case for relief but not for a sale. Part owners may agree as to the mode in which the vessel shall be managed, and the substance of the representations charged by the libellant as made to him is not unusual in such agreements. It is simply that the libellant should have the agency of the vessel for the purpose of employing her in the Florida trade. Such an

agreement properly made out by proof and affecting the other part owners, would be enforced in this court, not upon the ground of the specific performance of an agreement, which is an appropriate head of equity and not of admiralty jurisdiction, but as a maritime contract. Whatever may be the representations made to the libellant by the captain, they have not been proved to affect the other owners. There is no evidence that such representations from the captain to the libellant were ever known to them. It was not an agreement which the captain, in that capacity, had authority to make, so as to bind the owners, nor as co-owner had he authority to bind his associates by any such agreement. He may have incurred a personal liability to the libellant, but he has not affected the other owners with any liability.

The libel can only be retained for the stipulation which it asks, and which has been granted. The rest of the prayer, which asks for an account and sale, is refused.

In the Supreme Court of Vermont—Rutland County, February Term, 1856.

BOWEN & McNAMEE vs. ADDISON BUCK AND DAVID WARREN.

1. The law will permit a compromise of any offence though made the subject of a criminal prosecution, for which offence the injured party might recover damages in an action, but if the offence is of a public nature, no agreement can be valid that is founded on the consideration of stifling a prosecution for it.
2. Therefore, where the plaintiff's agent induced the giving of the note on which this action is brought by representing that a prosecution had been instituted and by agreeing to settle and stop that prosecution, the use made of this alleged prosecution to compel the giving of the note, renders the contract void.

The opinion of the court was delivered by

REDFIELD, Ch. J.—The question in the present case is, whether the plaintiffs' agent having induced the giving of the note in suit, by representing that a prosecution for obtaining goods by false pretences, had been instituted in the State of New York, and the proper

steps taken to arrest the defendant Buck, in this State, for the purpose of carrying him into New York for trial, and by agreeing to settle and stop the prosecution, the note is collectable, even if in point of fact the representations were false.

The plaintiffs' agent having obtained the note by these representations, and the plaintiff now seeking to enforce the note, implicates the plaintiff in these transactions of his agent. And having made the representations and induced the defendants to act upon them, he would now be estopped from denying them, so that as to both parties probably, as is held in *Dixon vs. Olmsted*, 9 Vt. R. 310, we may now regard as facts all the representations which were made and acted upon, and equally that the defendant is to be treated, as he chose to treat himself, as guilty.

In this view of the facts it is obvious, from the English cases referred to in the argument, and which are thoroughly reviewed in the late case of *Kier vs. Leeman*, 6 Ad. & Ellis, N. S. 308, that they are not, perhaps, altogether reconcilable, or the principle upon which they profess to go, easily to be discovered. But it is certain that the English statutes and the English practice, allow the party aggrieved far more control and agency in wielding criminal prosecutions for his own private advantage than has ever been allowed here. It seems to be supposed there, that in a certain class of inferior misdemeanors, the party aggrieved, and who has a private remedy for the same act, may use the criminal prosecution for the mere purpose of compelling a settlement of the private injury, and when the party is satisfied, the public prosecution is disposed of by a nominal fine. This has always been the English practice as to assaults and batteries, and it is obvious they have extended it to a class of misdemeanors affecting chiefly the interest of private persons, like nuisances. *Baker vs. Townsend*, 7 Taunt. 422; *Elworthy vs. Bird*, 1 Sim. & Stu. 372; *Beesly vs. Wingfield*, 11 East, 46; *Draye vs. Iberson*, 2 Esp. C. 643; *Fallowes vs Taylor*, 7 T. R. 475.

But in a class of cases quite numerous in the English books, it seems to have been considered that if the prosecution was one affecting public morals or example, it could not be controlled by a

private party, for his own purposes. Of this character are the following :

Pool vs. Bousfield, 1 Camp. 55, this seems to have been a case of giving money to hush a prosecution for matters in an affidavit. *Edgcomb vs. Rodd*, 5 East, 294, was a prosecution for disturbing a religious meeting, and the court held it could not be compromised by the parties affected mainly. *Collins vs. Blanton*, 2 Wilson, 341, 349, where it was held that a contract to withdraw a prosecution for perjury is founded on an unlawful consideration, and void, and in the principal case referred to, *Kier vs. Leeman*, it was held that the "parties might compromise all offences, though made the subject of a criminal prosecution, for which the injured party might sue and recover damages, but that in the present case the offence is not confined to personal injury, but is accompanied with riot and obstruction of a public officer in the execution of his duty." These are matters of public concern, and therefore not legally the subject of a compromise."

This is the latest English case on the subject which has been brought to our notice. The distinction here attempted, if we correctly apprehend the meaning of the learned judge, is between prosecutions for such acts as exclusively affect private persons, and involve no considerable proportion of moral turpitude, or any infamy of punishment, or personal disqualification, or seriously affect the public, that is between assaults and batteries, and nuisances, and offences of this grade, and such as involve the offender in infamous punishment, and personal disability, and externally concern the public order and well-being. There is another distinction aimed at, but not well defined ; it is that the class of crimes which the English law will not allow the injured party to compromise, and which involve something entirely different from the mere act which constitutes a private injury. As theft, for instance, which always involves a trespass ; or embezzlement, which involves a liability for the money or thing embezzled : but beyond all this there is involved a felonious purpose and intent, which constitutes the essence of the crime, and which seriously concerns the administration of public justice.

To apply these distinctions to the present case, it is obvious that

the obtaining goods by false pretences, does involve an act for which a private action will lie, as was held by this court in *Poor vs. Woodburn*, 25 Vt. R. 234. It is true, the party selling the goods under the alleged false pretences, is precluded from an action of tort, by insisting upon his securities taken upon the sale and attempting to enforce them, thereby affirming the sale. It is considered that he must, upon the earliest notice of the alleged fraud, abandon his securities and demand the goods, *Kingsford vs. Merry*, 34 Eng. R. 607. If so, he may bring trover as in the case last cited, and in *Fitzsimmons vs. Joslin*, 21 Vt. R. 129, but the party cannot hold on upon his contract for the price of the goods, and also sustain an action for the fraud, as the remedies are deemed inconsistent; but there is something more than the mere concession of the party's goods in this offence. There is involved fraud of a very dangerous character to public confidence, and in the punishment of which the public have a deep interest, and which, by the law of most commercial States, is attended, upon conviction, with infamous punishment and personal disability. At common law, this class of frauds was regarded as intimately related to, if not in fact, a part of the *crimen falsi*.

We think, therefore, that by the rules of the English common law, the use made of this prosecution for the public offence, to compel security for the price of the goods, renders the contract void as against the soundest principles of public policy. In regard to this class of offences, with us denominated high crimes and misdemeanors, until the Revised Statutes, it was long since decided by this court, that prosecution after the offender was arrested and bound for his trial before the court having jurisdiction to try, must be by the public prosecuting officers. *State Treasurer vs. Rice et al.* 11 Vt. R. 339. The important distinction between the mode of prosecuting offences in England and this country, is there pointed out, and commented upon by Williams, Ch. J., and in this State, there can be no question, we think, that the use made of this public accusation of crime has long been regarded as an abuse of public justice to private and sinister ends, which the law will not allow. The cases of *Sumner vs. Hinesburgh*, 9 Vt. R. 23; and *Dixon vs. Olmsted*, id.

310, seem to cover the important question involved in this case, and the case of *Show vs. Spooner*, 9 New H. R. 196, is almost identical with the present, and all these cases stand, as we think, upon ground that is altogether unassailable.

I question, very seriously, whether in this State, a private person has any right to use any public or private prosecution for crime of any grade, for the purpose of inducing a settlement, security or payment of a private claim, for private loss or injury. At all events it must be considered as well settled everywhere, that no such use can be made of a prosecution for a crime of the character here indicated.

The fact, that this note was given for the agreed price of the goods, is certainly not decisive. The party without the use made of the public prosecution, might not have been able to obtain security for that amount, or any part of it. If so, he should not have resorted to this abuse of a public prosecution. It is not duress, but illegality which makes this contract ineffectual. This, of course, may be taken advantage of by all parties in defence.

• Judgment affirmed.

In the Supreme Court of Pennsylvania.

THE STATE OF OHIO EX REL. WALTER HINCHMAN, (A MINOR) BY HIS
NEXT FRIEND, DAVID H. TAYLOR vs. MORGAN HINCHMAN.

1. The record of a judgment obtained in a Probate Court of Ohio in a proceeding upon habeas corpus, is within the provisions of the Act of Congress of 26th May, 1790, providing for the authentication of records from sister States.
2. In an action brought in this State upon a judgment, certified under said act as a decision of the Supreme Court of the United States, the courts of this State are bound to take notice of the local laws of the sister State, in the same manner as that court would do on a writ of error to the Supreme Court of this State.
3. The act of Congress does not forbid the union of the offices of judge and clerk in the same person; and it is no objection, therefore, to the attestation and certificate of a record from a sister State, that they are both given by the same person, where the laws of that State provide for such union.

4. The act of Congress does not preclude any other evidence of the authenticity of a record of a sister State, which the courts of another State may deem competent.
5. Where the record itself shows that the person giving the certificate must necessarily have been "the judge, chief justice, or presiding magistrate" of the court, it is not material or requisite to the validity of the authentication of a record, under the act of Congress, that the language of the certificate itself should exclude every other supposition.

Debt on a judgment of a Probate Court of Ohio, for costs accrued in proceeding by habeas corpus. A writ of habeas corpus, in the name of the State of Ohio, at the suggestion of Walter Hinchman, (a minor) by his next friend, was issued out of the Probate Court of Hamilton County, Ohio, directed to the sheriff, commanding him to have the body of said Walter before said court forthwith, and to summon Morgan Hinchman, to appear and show cause why he, as it was said, imprisoned and restrained of his liberty, the said Walter. The sheriff produced the body of the said Walter in court, and summoned the said Morgan, who appeared and filed his answer to the petition on which the habeas corpus was grounded. The matter was regularly proceeded in, and a final decree rendered, by which it was adjudged that the said Morgan deliver up and set free the said Walter from all restraint and custody, and pay the costs of the proceeding, taxed at \$438 83. The present action was debt upon said judgment to recover the amount of said costs. The pleas were, nul tiel record, payment, and set off, with leave, &c.

Upon the trial, the plaintiff offered in evidence a certified copy of the record of the proceedings upon the habeas corpus; to which the defendant objected as not being such a record as is within the Act of Congress, and as not being authenticated according to the provisions of said act. The authentication was as follows:

The State of Ohio, Hamilton County, ss.

I, John B. Warren, Judge, and ex-officio Clerk of the Probate Court within and for the County of Hamilton, and State of Ohio, do hereby certify that the foregoing is a true and correct transcript of the record and proceedings of said Probate Court, in the case of the State of Ohio ex rel. *Walter Hinchman vs. Morgan Hinchman*,

on a writ of habeas corpus, as the same remains of record and on file in said court.



In testimony whereof, I have hereunto set my hand, and affixed the seal of the said Court, at Cincinnati, this ninth day of January, in the year of our Lord one thousand eight hundred and fifty-five.

J. B. WARREN, *Probate Judge and ex-officio Clerk.*

The State of Ohio, Hamilton County, ss.

I, John B. Warren, Judge of the Probate Court, within and for the county of Hamilton and State of Ohio, do hereby certify that J. B. Warren, whose signature is attached to the foregoing certificate, is now, and was at the time of signing the same, ex-officio clerk of the said Probate Court, and that his attestation is in due form of law, and is entitled to full faith and credit.



In testimony whereof, I have hereunto set my hand, and affixed the seal of said court, at Cincinnati, this ninth day of January, in the year of our Lord one thousand eight hundred and fifty-five.

J. B. WARREN, *Probate Judge.*

The record itself stated that the proceedings were had before "J. B. Warren, sole judge," &c. The court overruled the objections, and admitted the evidence, reserving the points; to which the defendant excepted. The jury found a verdict for plaintiff for \$463 04, subject to the opinion of the court on the points reserved. The court afterwards entered judgment for the plaintiff on the points reserved, and on the plea of nul tiel record, whereupon the defendant took this writ of error.

S. C. Perkins and *S. H. Perkins*, for plaintiff in error.

1. A record of proceedings upon a habeas corpus issued out of a Probate Court of the State of Ohio, is not such a record as is within the act of Congress of 26th May, 1790. The record of any judgment of any court of a sister State would be treated in all respects as a foreign judgment, were it not for Art. IV., Sec. 1, of the Constitution of the United States, and the act of Congress. This act

makes certain provisions for the authentication of records and judicial proceedings; but does not provide for all cases. *Warren vs. Flagg*, 2 Pick. 448. It must appear that the court whose alleged record is offered in evidence was such a court as necessarily keeps a record. Jurisdiction will be presumed in regard to courts whose names are derived from the common law, and where the record itself bears every evidence of being of a court of record. But the very name "*Probate Court*," implies a court of limited jurisdiction. The proceedings of probate courts are not according to the common law; it cannot be presumed that they have any jurisdiction of a matter of habeas corpus, which is emphatically a common law writ.

Proceedings upon a habeas corpus, are not such proceedings of which a record is bound to be made, or presumed to be kept. It must be shown affirmatively, that the probate judge is authorized and bound to keep a record of proceedings under a habeas corpus.

A decision of one judge or court upon a matter of habeas corpus, is not binding upon any other judge or court. *Comm'th vs. Biddle*, 6 P. L. J., 287, *Comm'th vs. Fox*, 1 id. 227; S. C. 7 Barr, 336. Such a proceeding is not regarded as possessing even the ordinary attribute of a judgment, that it cannot be inquired into collaterally; but it is treated with still less respect, as if it never had an existence. A proceeding upon a habeas corpus is not ordinarily the subject of revision by a superior court; no writ of error or appeal lies, unless by special and express provision.

The very fact that the Probate Court had no clerk, distinct from the judge, shows the inferior character of the court. *Duval vs. Ellis*, 13 Missouri, 208.

The cases in which it has been expressly decided, or strongly intimated, that records of proceedings before Justices of the Peace are not within the Act of Congress, are analogous. And the reasoning of many of these cases proceeds on the very ground of the absurdity of the same man certifying as clerk, and then, under another title, certifying that what he has done as clerk, is correct. *Kean vs. Rice*, 12 S. & R. 208, *Snyder vs. Wise*, 10 Barr, 160; *Robinson vs. Prescott*, 4 New Hampshire, 450; *Mahurin vs. Bick-*

ford, 6 id. 570; *Gay vs. Lloyd*, 1 Green, (Iowa,) 78; *Silver Lake Bank vs. Harding*, 5 Ohio, 546.

The act of Congress is carefully drawn; but one amendment, (1804,) having been found necessary in the course of nearly seventy years. It is reasonable to infer, where one exceptional case has been provided for by the words "if there be a seal," that had there been any intention to provide for the contingency of the clerk and judge being the same person, equally express words would have been inserted.

The jurisdiction of a court of inferior jurisdiction should have been shown affirmatively, before the record was admitted. If it had no jurisdiction, the record of the proceedings was no record as to the defendant. *Thomas vs. Robinson*, 3 Wendell, 267; *Bloom vs. Burdick*, 2 Hill N. Y. Rep., 130. But the alleged record was offered upon its own inherent merits simply.

The Constitution and act of Congress do not prevent inquiry into the jurisdiction of a court of a sister State, *Starbuck vs. Murray*, 5 Wendell, 158; *Noyes vs. Butler*, 6 Barbour S. C. Rep., 613; *Street vs. Smith*, 7 W. & S. 447.

2. But the authentication of the record is defective. The certificate does not show that the certifying officer is "*the judge, chief justice, or presiding officer*," *Lothrop vs. Blake*, 3 Barr, 487; *Hudson vs. Daily*, 13 Alabama, 722; *Stephenson vs. Bannister*, 3 Bibb, 369. The fact that the certificate of the clerk and that of the judge are given by the same individual, is a further defect. The Act of Congress manifestly contemplates the clerk as distinct from the judge. Nor can any statute of Ohio which may authorize a probate judge to act as his own clerk, affect the act of Congress. In *Lothrop vs. Blake*, *supra*, where the question arose upon the authentication of a record from Ohio, the attestation of which was by a deputy clerk, Rogers, J, says expressly, nor will the statute of Ohio, which enables deputies to perform the duties of the principal, make the authentication of the record by him evidence; as this would enable the several States to alter and control the Act of Congress. It must be construed by itself independent of legislative enactments. The independent certificate of a distinct individual,

the one best fitted to know the fact, that the attestation is in due form, is provided for. But this provision is practically abrogated, if the same individual by appending to his name distinct titles, can be allowed to discharge both functions. It is no guaranty, no assurance at all in respect to the verity of the record. And see the cases in reference to proceedings before justices of the peace, cited *supra*.

Charles Gibbons, for defendant in error.

The opinion of the court was delivered by

WOODWARD, J.—~~This~~ was an action of debt brought to recover a large bill of costs for which judgment had been rendered against the defendant by the Probate Court of Hamilton county, Ohio, in a proceeding by *habeas corpus* before that court. When the plaintiff offered the certified copy of the record in evidence, attested by J. B. Warren, Probate Judge, and ex-officio Clerk, under the seal of the court, and certified by J. B. Warren, as Probate Judge, also under the seal of the court, the defendant objected to it as not being such a record as is within the act of Congress, and not being authenticated agreeably to the same act. The court overruled the objection, and having admitted the record, decided that the proceedings under a writ of *habeas corpus* would support the present action, and these are the grounds of the errors assigned.

There was no proof offered in reference to the constitution and jurisdiction of the Probate Court of Ohio, but we suppose we are bound, in the circumstances of this case, to take notice *ex officio* of the local laws of Ohio. The questions before us arise under the constitution and laws of the United States. Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State, says the federal constitution; and the act of Congress of 26th of May, 1790, providing for the mode of authenticating the records and judicial proceedings of the State courts, declares that "the records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States, as they have by law or

usage in the courts of the State from whence the said records are or shall be taken."

A judgment of this court adverse to the right arising out of the federal constitution and legislation would be reviewable in the Supreme Court of the United States, and there the States of the confederacy are not regarded as foreign States, whose laws and usages must be proved, but as domestic institutions whose laws are to be noticed without pleading or proof. It would be a very imperfect and discordant administration for the court of original jurisdiction to adopt one rule of decision, while the court of final resort was governed by another, and hence it follows, that in questions of this sort, we should take notice of the local laws of a sister State in the same manner the Supreme Court of the United States would do on a writ of error to our judgment. 7 Cranch, 408; *Id.* 481; 3 Wheat. 234; *Baxley vs. Lynch*, 4 Harris, 243.

Referring ourselves, then, to the laws of Ohio, we find that by the 7th section of the 4th article of her constitution of 1851, a court of probate is established in each county, "which shall be a court of record, open at all times and holden by one judge;" and by the 8th section, jurisdiction in *habeas corpus*, "as may be provided by law," is, among other powers, expressly conferred upon this court.

By an act of assembly defining the jurisdiction and regulating the practice of probate courts, passed the 14th of March, 1853, concurrent jurisdiction with the other courts is conferred upon the probate courts in allowing and issuing writs of *habeas corpus*, and in determining the validity of the capture and detention of persons brought up on such writs. By section 10 of this act, the judges of said courts have the care and custody of all files, papers, books and records belonging to the probate office, and are authorized and empowered to perform the duties of clerks of their own courts, or to appoint deputies to act as clerks for them.

By section 15, orders for the payment of money may be enforced by execution or otherwise, in the same manner as judgments in the Court of Common Pleas.

By the 11th section of an act relating to *habeas corpus*, passed 8th February, 1847, the judge before whom the writ is returnable

has power, after hearing, to tax the costs and fees allowed by law to witnesses and officers, and "where the person was in custody by virtue or under color of proceedings in any civil case, such costs shall be taxed against the party at whose instance such person was so in custody, in case he shall be discharged; but against such person so in custody in case he shall be remanded to custody."

From all this it appears, first, that the Probate Court had jurisdiction to render the judgment sued on. The costs accrued in proceedings in a civil case. And this appearing, upon an inquiry which we are bound to institute, it matters not that the Probate Court ranks as an inferior tribunal, and not as one of those superior courts who exercise a common law jurisdiction, and whose acts and judgments are conclusive in themselves—for the strictness with which the proceedings of inferior tribunals are scrutinized, only applies to the question of jurisdiction, and when the existence of that is proved or conceded, the maxim *omnia rite acta* applies to them as well as to courts of general jurisdiction. 1 Smith's Leading Cases, (H. & W.) 817.

The next conclusion which results from the local laws of Ohio, is that the record of the Probate Court was well attested and certified.

The act of Congress requires the attestation of the clerk and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the said attestation is in due form.

Here we have the attestation, the seal, and the certificate, in due form; but it is said the act of Congress contemplated the record of a court having both a judge and a clerk, whose official acts should be a check on each other. Doubtless. But it does not forbid the union of the two offices in the same person, nor invalidate formal and legal acts because performed by one and the same hand.

The remark of Chief Justice Tilghman, in *Kean vs. Rice*, 12 S. & R. 208, that if the New Jersey justices of the peace, whose record he was considering, had no clerk, it would be impossible to comply with the act of Congress, does not apply here, because the Probate Court of Hamilton county *has* a clerk, and that clerk has attested

the record under the seal of the court; and by the laws of Ohio the judge of the court is lawfully the clerk of the court.

In form this is a strict compliance with the act of Congress, and in substance it is an essential compliance. But even if this were not a sufficient compliance with the act of Congress, we would still treat it as an adequate authentication upon general principles, and independently of the act of Congress. That act prescribes a general rule which makes records admissible in every State, but it does not exclude any other evidence which the courts of a particular State may deem competent. *Baker vs. Field*, 2 Yeates, 532; *Kean vs. Rice*, 12 S. & R. 203.

The only remaining objection that the certificate does not show that it is by *the* judge, chief justice, or presiding magistrate of the court, is answered by the record itself, which describes J. B. Warren as *sole* judge of the court, and by the constitution and laws of Ohio, which show that the Probate Court is to consist of a single judge.

This record of a judgment rendered by a court of competent jurisdiction, and certified in substantial compliance with the act of Congress, is entitled to "full faith and credit"—an expression which the act of Congress defines to be "such faith and credit as it has by law or usage in the courts of the State from whence it comes." In that State it would be ground for an action of debt and evidence to charge the defendant. In the particular forum where the judgment was rendered, it would be ground also of an execution; but we give it, not the remedial effect of the former, but the credit which the *State* gives it in her tribunals. With them it would not be ground of execution, but of an action, and with us it is the same.

The judgment is affirmed.

In the Supreme Court of Pennsylvania.

JOHN M'INTYRE vs. KENNEDY, CHILDS & CO.

1. Where A, the debtor paid to B, the creditor two checks, one his own, and one that of a third party, the mere taking of the checks for a pre-existing debt and without any express-agreement that they should be payment, does not make them payment; and A is liable to B for the second check, if worthless or unpaid, although it is the check of a stranger and A's name does not appear upon it.
2. The principle ruled in *Bayard vs. Shunk*, 1 Watts, & Serg. 95, affirmed.
3. It is a general rule that if one indebted to another by simple contract give his creditor a promissory note or check drawn by himself for the same amount, without any new consideration, the check or note shall not be deemed a satisfaction of the original debt, unless so intended and accepted by the parties.
4. Whether a debtor pays out his note or check or the note or check of a third party, the creditor, in the absence of any special agreement, may resort to his debtor if the check or note is unpaid.

The opinion of the court was delivered by

WOODWARD, J.—A creditor applies to his debtor for part payment of the debt, and receives from him his own check and the check of a third party, the latter of which, on presentment in due time, is refused payment,—is this satisfaction *pro tanto* as between the debtor and creditor? or, in other words, which of them is to sustain the loss of the worthless check?

We suppose that among business men this question would be of easy solution; that a check given by a debtor, whether his own or another's for a pre-existing debt, would be regarded as conditional payment, as payment if paid, and that if, with reasonable diligence on the part of the holder, it proved worthless in his hands, the debtor would be obliged to receive it back and pay the amount of it to his creditor. The rights and liabilities of the parties would of course be controlled by any express agreement between them, but where there is none, where it is a simple payment and receipt of a check, supposed by both parties to be good, the debt is not satisfied until the check is paid. The holder assumes the duty of presenting the check and demanding payment within a reasonable time, and if he neglects to do so, and the banker fails after the time it ought to have been presented, the loss is to be borne by the holder, not by

reason of the receipt of the check, but of his negligence which has occasioned the loss. He may not charge against his debtor the consequences of his own neglect, and this, on the same principle of natural justice, which forbids the debtor to take advantage of *his* wrong in issuing a worthless check to a *bona fide* creditor. These principles are of every day's application among business men, but the case before us questions them and compels us to look into the authorities to see if they have not the obligatory force of law.

The argument on the part of the defendants in error resolves itself into the assumption that checks are of the same quality as bank notes, and then applies the principle of *Bayard vs. Shunk*, 1 W. & S., 95, wherein it was held that a payment, by a sheriff, in current bank notes, discharges the debt, although, in consequence of the previous failure of the bank, of which both parties were ignorant, the notes were of no value at the time of payment.

But neither the assumption nor the application can be sustained. Checks resemble bills of exchange rather than bank notes, (Chitty on Bills, 17; 7 T. R., 430; 3 Johnson C., 5.) and fall within that class of securities which Chief Justice Gibson, in this very case of *Bayard vs. Shunk*, so broadly distinguished from the common currency of the country. Like bills of exchange, they are open letters of request for the payment of money to a particular person, or his order, or to bearer. They are drawn against a supposed deposit. They are not payment, but an order on the depository to make payment for the drawer. When payable to bearer they pass by mere delivery, like bank notes, but so do promissory notes and bills of exchange. The grand distinction between all these securities and bank notes is, that by the conventional rules of business they do not enter at all into the currency of the country, a very large part of which is made up of bank notes. These are lent by the banks as cash, they are paid away as cash, and the language of Lord Mansfield, in *Miller vs. Race*, 1 Burr. 452, was not too strong when he said, "they are not goods, nor securities, nor documents for debts; but are treated as money, as cash, in the ordinary course and transaction of business, by the general consent of mankind, which gives them the credit and currency of money, to all intents and purposes; they are as much money, as guineas themselves are, or

any other coin that is used in common payments as money or cash." It was on the ground of this distinction, that *Bayard vs. Shunk*, was ruled. The parties dealt in the common currency of the country, each of whom had the same opportunity to know its character, and both of whom were ignorant of its worthlessness, and therefore they were held to what they had done. But that case, so far from being pressed into the service of the defendants, is an authority against them. "If the securities," says the chief justice, in speaking of bills and notes—among which, I submit, it is giving checks all the dignity that is their due, to rank them—"If the securities are transferred for a debt contracted at the time, the presumption is, they are received in satisfaction of it; but if for a precedent debt, it is that they are received as collateral security for it, and in either case it may be rebutted by direct or circumstantial evidence." This was not, strictly speaking, an *obiter dictum*, for it was necessary to the bringing out, in bold relief, the distinction on which the case was ruled, but it is entitled, for a better reason to be considered an authority—because it expresses the very mind of the law, as I now proceed to show.

In *Weakley vs. Bell*, 9 Watts, 280, Judge Kennedy tells us, the general rule seems to be, that if one indebted to another by simple contract, give his creditor a promissory note, drawn by himself, for the same amount, without any new consideration, the new note shall not be deemed a satisfaction of the original debt, unless so intended and accepted by the creditor. *Hart vs. Boller*, 15 S. & R. 162; *Roberts vs. Gallaher*, 2 Wash. C. C. R. 191. "And most clearly all the authorities go to show," added his Honor, "that at law, accepting of a security of equal degree, either from the debtor himself, with or without a surety, or from a stranger alone, at the instance of the debtor, is no extinguishment of the first debt, as where a second bond is given to the obligee; for one bond cannot determine the duty of another." This was said in a case where the attempt was made to make the note of a third party delivered by a debtor to his creditor, payment of his own note, and the doctrine announced, is decisive of the present case, unless it can be shown, which it cannot, that bankers' checks are a superior security to simple contract debts, and promissory notes.

But even a higher security for a debt given by different parties, or for a different sum, will, in the absence of proof of the intention of the parties, be presumed to have been accepted as collateral security, and not in satisfaction of the debt. *Jones vs. Johnson*, 3 W. & S. 276; *Eby vs. Eby's Assignees*, 5 Barr, 440. So that it would not help the argument, if checks could be treated as higher security than bills and notes.

In *Tyson vs. Pollock*, 1 Penrose & Watts, 376, two firms, Tyson & Co., and Byrne & Co., joined in a written agreement, to purchase of W. J. Pollock, a quantity of wheat, for which they were to pay in the paper of certain specified banks. As the wheat was delivered, the two purchasing firms divided it between them, but instead of paying in bank notes, each firm gave the creditor bills on Baltimore for their respective shares of the wheat. The bills of Tyson & Co. were paid, but those of Byrne & Co. were protested, and this was an action against Tyson & Co. on the original contract, to recover for the wheat had by Byrne & Co. The plaintiffs recovered, and in affirming the judgment, Ch. J. Gibson said—"In relation to the partnership, each of the partner firms may be treated as a stranger, capable of dealing with it in the character of debtor or creditor; and as by the contract of sale, the wheat was to be paid for in the notes of particular banks, the subsequent acceptance of bills drawn by the partner firms, was payment in the bills of a stranger of a precedent debt. On no other hypothesis could there be the shadow of a defence; for, as one simple contract will not merge in another, it has invariably been held that the debtor's own bill or note for the price of goods sold, will not extinguish the original liability. *Ld. Raymond*, 1430; 2 *Strange*, 1218; *Willes*, 406. It merely operates as an extension of credit, and prevents a recurrence to the original contract of sale before the bill or note has come to maturity. 1 *Esp.* 3. We have then, payment of a precedent debt in the bills of a third person, which has been universally held since *Clark vs. Munden*, 1 *Salk.* 124, not to be absolute satisfaction, although it is otherwise where such payment has been in pursuance of the original bargain. I feel no disposition to review the authorities, but I may safely affirm, that no case can be found in which any other doctrine was ever held. In *Sheely vs. Manda-*

ville, 6 Cranch, 264, the acceptance of a bill was barely held to be a sufficient consideration for an agreement to discharge the precedent debt." The strong confidence of the venerable chief justice, fully justified by the general current of the authorities, was too strongly expressed, in saying that *no* case can be found inconsistent with the doctrine which has always prevailed in this court.

There are some Connecticut and Massachusetts cases which favor the doctrine that a note or bill of exchange is payment of a precedent debt. *Anderson vs. Henshaw*, 2 Day's R. 272; *Thatcher vs. Dinsmore*, 5 Mass. R. 297. In *Ellis vs. Wild*, 6 Mass. 321, the doctrine was carried to the extent of holding that forged notes were payment of goods sold. And possibly a stray case may be picked up elsewhere, to stand as an exception to Judge Gibson's remark, but the general tenor of the authorities in England and the United States, is exactly that which he stated it to be.

Chief Justice Holt, stated the law in these few words, in *Ward vs. Evans*, 2 Lord Raymond, 930; "taking a note for goods sold, is payment, because it was part of the original contract, but paper is no payment where there is a precedent debt. For when such a note is given in payment (that is for a precedent debt), it is always intended to be taken under this condition, to be payment, if the money be paid thereon in convenient time." See also *Prectford vs. Maxwell*, 6 Term R. 52.

Taking a bill of exchange or promissory note, either of the debtor or a third person, for a pre-existing debt, is no payment. *Toby vs. Barber*, 5 Johns. 68; *Herring vs. Sawyer*, 3 Johns. Cases, 71. But where on the sale of goods, the bill or note, of a third person is received by the seller, it is payment. *Whittech vs. Vankess*, 11 Johns. R. 409. It is stated, said the Supreme Court of New York, in *Hays vs. Stine*, 7 Hill, 130, that acceptance of the bill or note of a third person does not cancel a previous debt, unless it is agreed to be received in absolute payment and satisfaction: subsequent events may charge the creditor with the amount of the bill or note, as where he neglects to make demand and gives notice by which the security of some of the parties is lost, but the mere acceptance of a bill has never been deemed to be a payment of a previous debt.

In the note of Hare & Wallace, to the case of *Cumber vs. Wane*, 1 Smith's Leading Cases, 5th Am. ed. p. 457, the result of the authorities on the point before us, is stated thus: the note or bill of a third person may be given by a debtor, and received by the creditor, as collateral security—as conditional payment, that is, to be a satisfaction if and when paid—or as an absolute and immediate satisfaction and discharge, and to be wholly at the risk of the creditor. Which of these three it will be, depends entirely upon the intention of the parties, to be derived from all the circumstances of the case. The mere acceptance by the creditor of a negotiable note of a third person makes it but collateral security. If the note be taken as payment, that is ordinarily and *prima facie*, but conditional payment. But the note will operate as an immediate and absolute satisfaction and discharge of the debt, if such be the intention and understanding of the parties, and such intention is to be implied where the notes of a third person are accepted in payment at the time the purchase is made, for it is to be understood as an exchange or barter, but where they are given for a pre-existing debt the presumption is the other way, and nothing short of an actual agreement, or some evidence from which a positive inference of discharge can be made, or proof of fraud, will suffice.

This is so clear and satisfactory a summary of the authorities, both English and American, that I do not think it necessary to go through them. I will add only a few others relating especially to checks. Mr. Byles, in his work on Bills, at p. 17, says, if a creditor in payment of any other debt than a bill or note, take a check, and the banker fail, or the check be dishonored, the creditor's remedies remain entire.

It is to be observed that he lays down the rule in general terms, without taking a distinction between checks drawn by the debtor or by a third party, and only paid out by the debtor. One of the cases he cites, *Everett vs. Collins*, 2 Campbell, 515, would have justified such a distinction, for Lord Ellenborough does expressly put his judgment on the ground, that the check was drawn by the agent of the debtor, but that was a case in which money was offered to the creditor, and he insisted on taking a check. Still the debtor was held liable on failure of the bank to pay the check, because it

was regarded as the debtor's own check. The other cases cited make no account of such distinction, and as *Everett vs. Collins* was only a *Nisi Prius* judgment, the learned author of the work on bills, did well to take no notice of it. If however, the fullest effect were given to Lord Ellenborough's distinction, it would merely prove that the creditor, who insisted on taking the check of a third party instead of money, would be without recourse.

In another elementary book of great excellence, Addison on Contracts, p. 552, a new edition of which, edited by Edward Ingersoll Esq., of the Philadelphia Bar, has just appeared, the same rule is laid down in regard to bankers' checks, and without noticing a distinction between those drawn by the debtor, and those of third persons issued by him. If the check is presented in due time and refused payment, the loss will fall on the drawer, is this author's mode of stating the rule.

It was said by Tilghman, Chief Justice, in *Patten vs. Ash*, 7 S. & R. 116, that a naked check payable to one or bearer, is no evidence *per se* of payment to the person whose name is inserted. It is necessary to prove that he received the money. The same thing in effect was said by Chief Justice Nelson, in the *People vs. Baker*, 20 Wendell, 605. In the *People vs. Howell*, 4 Johnson R. 303, the language of Chief Justice Kent, in respect to a check, was—"if there was a pre-existent debt, for which it was given in payment, the debt would still exist against the debtor, if the check was not good. Unless a check be paid it is no payment.

Where a check on a bank is given, in the ordinary course of business, it is not to be presumed to be received in absolute payment of a debt, even if the drawer have funds in the bank, but as the means whereby the holder may procure the money. The holder becomes the agent of the drawer to collect the money; and if guilty of no negligence in presenting the check for payment whereby an actual injury is sustained by the drawer, he will not be answerable if from any peculiar circumstances attending the bank, the check be not paid; but in a suit against the drawer for the consideration of the check, the holder may treat it as a nullity, and resort to his original cause of action. *Cromwell & Wing vs. Lovett*, 1 Hill's N. Y. R. 56, afterward affirmed in Supreme Court.

Such is the voice of authority, in regard to the character of checks as an instrument of payment. Distinctions are not taken between payments in the debtor's checks, or those of a third person, because no ground exists in reason for such a distinction. When this plaintiff applied to the defendants, for \$200 of what they owed him, and they gave him their own check for \$132 94, and that of E. Bromfield & Brother, for \$67,06, had they paid him one of these sums any more than the other? If their own check had not been paid, it is admitted he would have recourse to them; their check was not then, *per se*, payment. But they were well known to him, and he had confidence in them, as is shown by leaving his money in their hands. It does not appear that he knew Bromfield & Brother, or had any reason to confide in them. Did he indeed take their check, as higher security, than that of his chosen debtors? Are we to hold that the check of the defendants, was not payment, but that of Bromfield & Brother, was? On what principle? No words were spoken, or agreement made to create a difference. Both were mere checks—of exactly the same grade and quality in law. If we are to make implications from the circumstances of the parties, the reasonable presumption would be that the plaintiff received the check of the defendants, with more faith and confidence—with stronger assurance that it would be paid—than the check of a party unknown to him. It is more reasonable, to infer that he meant to be their insurer, rather than the insurer of the other drawers. If a distinction were to be made at all, between these instruments of payment, it ought to be in favor of the one which is admitted not to have been payment, and against the one that is claimed to have been payment.

But there is no ground for such a distinction. None surely in reason as applied to this transaction—none in authority, as I have abundantly shown. The plaintiff received both checks, on the same footing—as payment, if or when paid. With proper diligence, without the slightest imputed negligence, one of them proved uncollectable. And now, on a question of payment between debtor and creditor, that check can no more be considered payment than if it had been drawn on the same bankers by the defendants themselves. They are not liable as drawers, or endorsers, for they kept their

name off of it, but they are liable on the original debt, for, to the extent of this worthless paper issued by them, it remains unpaid.

There is no principle in our jurisprudence better settled or more benign than that as between the original parties to a contract, equity will relieve against a failure of consideration. If the defendants had not had full value from the plaintiff, they would have claimed relief. The most solemn contracts, even bonds and mortgages, do not exclude inquiry into the consideration. How is this acceptance of two checks, to be elevated so high as to be above inquiry or relief? Is it indeed so that the law will relieve against failure of consideration in all contracts, except only when a creditor receives from his debtor a check of a third party? A rule so absurd and so unprincipled could have no other effect than to impair that confidence which is the very life of commercial transactions, and to compel debtors to make their payments in the constitutional currency.

But it is said, the case stated makes the checks payment, and that we must take the fact as if found in a special verdict. In the narrative of the transaction the case stated speaks of the checks being paid to the plaintiff, but there is not a word in it which implies that he acknowledged them as satisfaction of his debt—or even gave a receipt for them, or qualified the mere reception of them by any express or peculiar terms. Had there been any thing of this sort—a receipt in full if you please—the authorities cited show it would have been only conditional payment, and other numerous authorities which it were a shame to array in an opinion, prove that all manner of receipts, even those upon deeds of conveyance, are open to explanation, and may be proved not to have been actual and *bona fide* payments.

But of receipt, acknowledgment or agreement, there was nothing—the mere acceptance of the checks was the only payment the special verdict finds. Payment, but payment in checks. This is what the case stated makes it. And this not by way of barter, but payment in checks of a pre-existent debt, and this was conditional payment—payment when the checks were paid, or else the law means not what it says.

The judgment is reversed, and judgment is entered here on the case stated, for plaintiff, for \$71 86 and costs.

In the District Court of Philadelphia.

SMEDLEY vs. CONAWAY.

1. When the plan of a building is changed and greatly enlarged, while it is in the course of construction, the liens of mechanics and material-men subsequent to such change relate only to the commencement of the alteration on the ground, and are subject to all liens which then had fastened on the land.
2. In the distribution of the proceeds of a sheriff's sale, a judgment in a *scire facias* on a mechanic's claim is not *prima facie* evidence, in a contest with other lien claimants.

Ottersen and Guillou, for exceptants.

W. S. Price and Waln contra.

The opinion of the court was delivered by

SHARSWOOD, P. J.—The question which is presented upon these exceptions is new, and the principle to be settled by its final decision, of great importance. It must be confessed, also, that it is a question of no little difficulty. The Acts of Assembly in relation to mechanics' liens, establish a system altogether out of the course of the common law; and upon points, evidently not foreseen by the legislature and upon which the statutes have not spoken, the only grounds of decision, to which we can resort, must be the general scope and spirit of the enactments, the analogy of cases which have already been settled, and such considerations of policy as may be supposed to have had their influence on the minds of the law makers. We are undoubtedly to aim at such results as will most effectually promote the interest and security of those classes of men, whom the system was designed to favor.

The facts are, that Conaway was the owner of a large lot of ground. On a part of this lot he commenced the erection of a building, intended as a manufactory for making saws by hand. After he had commenced and before he had completed this building, he determined to enlarge his plan so as to carry on his business with steam power. This change made necessary a number of additional buildings adjoining that first contemplated, and a very considerable outlay of money. Accordingly an engine house, with a costly steam engine, and other buildings, were then commenced and erected. Before the original building was finished, though it would seem after

he had entertained the design of enlargement, Conaway, who had been carrying on the business of manufacturing saws by hand at another place, moved into the premises. The mechanics' claims up to this time were all discharged, and Conaway raised on mortgage of the entire lot, the sum of \$2,175. No part of the intended improvements was then begun on the ground. Subsequently, however, to their commencement, he raised other sums of money on mortgage, and several judgments were entered against him. The mechanics engaged in constructing the enlargement filed their claims against the entire lot and buildings. The questions then are, whether their claims are valid liens, and if they are, to what period of time do they relate, the commencement of the first building, or the commencement, of what I shall term for convenience sake, the enlargement?

As far as material to the determination of these questions, the auditor reports as facts, and no issue having been demanded as to these facts, we assume them to be correct, that when the first building was commenced, it was no part of the *plan* of the proprietor to make this enlargement; there may have been in his mind a vague hope or expectation, that at some future period, when his increase of capital would enable him to do so, he would extend his establishment and introduce steam as the power by which to carry it on, but there was nothing beyond this, except that the plan may have been originally framed so that such an alteration might afterwards be conveniently made. It is also reported as a fact, by the auditor, that the change in question was a very material one—the character of the design was different—and that when the whole was done, it formed “an establishment in the same sense and effect as a mill, the machinery of which is driven by one engine placed in a separate house, and so that they would all pass by a deed under the description of a saw factory.”

We are clearly of opinion that the claims of the mechanics employed upon the enlargement ought not to be held to relate to the commencement of the original building. If they can, then the mechanics and material men, who trusted to the credit of the first structure, and based that credit, as they well might do, upon the fact that it was a reasonable and moderate enterprise, suited to the capital and resources of the owner, would be obliged by a subsequent

change of plan and a wild scheme of expansion, to lose a large part of their claims, and come in only *pro rata* with subsequent liens to an indefinite amount. There would be thus no limit to the power of the owner to involve them by subsequent changes of his plans. The true point of view to regard this question, by which to test the soundness of the principle to be applied to it, is to consider it as though it were a contest between mechanics and material men who had done their work and furnished their materials on the credit of the first building, and those engaged on the subsequent enlargement asking to be paid *pro rata* with them. The very foundation of the lien given to the mechanic or material man is, that he trusts the building. What building? That which is then in the course of erection upon a certain plan, and with a certain design. It is to be a dwelling house or a mill, a barn or a church. But if a man having begun and nearly completed a dwelling house, should then change his design, and determine to carry up the walls and make a shot-tower of it, can it be said, in the eye of the mechanics' lien law, that the shot-tower thus finished is the same building as that begun, and that the first and last mechanics are all to come in alike? A principle leading to results, which might prove so disastrous to the very class of men protected by this act, ought not to be easily admitted. Nor would it be less dangerous to others. The mortgagee in this case, when he advanced his money on the first mortgage, examined the ground. He saw a building nearly finished, which, when finished, would be a complete structure. He took the precaution to inquire and satisfy himself that all the mechanics and material men, who up to that time had been employed in that erection, were fully paid. Even if the proprietor had then in his mind the idea of an enlargement, is the mortgagee to lose his security entirely, by the commencement of extensive additions, the expense of which will swallow up the whole value of the original structure? In the case before us, the cost of the engine and gearing alone, included in the change, was more than \$11,000, to say nothing of the engine house and grinding shop. The true question then is, was the whole establishment erected on substantially one plan and design from the commencement, or was the plan or design so materially changed during the progress of the work as to make the

whole a different building from that which was or would have been erected had no such change taken place? I use this language cautiously, to exclude the idea that any project of subsequent alteration, whether vague or certain, whether entertained at the commencement or suggested during the progress of the building, and not embodied in the actual plan upon which it was commenced and carried on, could make any difference. If the change, whenever conceived or whenever put in operation, involved the whole design and character of the structure, if the whole when finished was substantially a different building from the one which was at first commenced, then the existence of such a design ought not injuriously to affect the liens of the mechanics and others who trusted to the building according to the original plan.

But it follows not from this course of reasoning, that the mechanics and material men employed about the enlargement have no lien whatever upon the building when erected, nor that their liens may not legitimately extend to the whole, from the time of the commencement of the enlargement, subject to the liens which had then already attached to the original structure. We have the fact that the change was a material one, altering the whole design, and that when complete, all together, both the original and the enlarged parts, constituted one establishment. The enlargement would be worthless, comparatively, at least, if it were separated from the main building, as much so as a kitchen separated from a dwelling. Would this case be different, for better or worse, at least so far as the principle is concerned, if this enlargement had been commenced ten years after the first building was finished, instead of a week before? It is well settled that when the whole design and character of an old building are changed by alteration and improvements, it is to be considered a new erection, within the acts of assembly relating to mechanics' liens. The claims of the mechanics and material men relate to the commencement of the alterations, and are subject to all prior liens, which had fastened upon the land before that period.

It is, perhaps, not easy to extract any clear rule of determination from the decided cases, as to what alteration of an old building shall constitute a new erection within the provisions of the statutes. It cannot be considered as definitely settled as yet, whe-

ther the question is one of law or fact. We have heretofore decided, and as yet adhere to that decision, that when the facts are ascertained or undisputed, it is for the court to determine what does or does not constitute new buildings. If it be a question of fact for a jury, then there may be different verdicts in regard to the same building by different juries, and some mechanics have their claims allowed and others rejected, which would be the most palpable injustice. It is no more an indefinite question than are the questions of reasonable notice and probable cause which have been finally resolved into questions of law for the sake of that certainty and uniformity which are always to be sought after in the administration of justice.

In *Hoover vs. Pennock*, 5 Rawle, 307, Judge Kennedy said: "Neither is it easy to conceive how a change made in the plan of the house after it has been commenced, by enlarging or contracting or in any other respect changing the plan of it, *as long as the original design of its character is retained*, can with propriety be said to change or give a new commencement to the building of it." He evidently contemplates that there may be such an entire change of plan as will give a new commencement to the work, and that is when the *original design of its character* is changed. It may be safely conceded that unimportant alterations in the plan, such as the height or the number of the stories, the arrangement and finish of the different rooms, or even the addition of one or more out-houses, not materially altering its character, would not affect the rights of subsequent claimants. But it cannot be meant that there must be a total change of purpose, as from a store to a dwelling. The cases of *Driesbach vs. Keller*, and *Armstrong vs. Ware*, show that it is not essential. In *Driesbach vs. Keller*, 2 Barr, 79, there was an old one-story dwelling, the roof was taken off, it was raised one story, a new two-story house was built alongside of it, and the whole put under a new roof. "Repairs," said Judge Sergeant, "may be slight, or in some cases they may be very considerable, and carried to such an extent as in fact to amount to the erection of a new building, different in its capacities and character from the old one. In extreme cases there can be no difficulty in determining in which class to rank it, either as merely repairing or restoring an

old building to its original state, or as, in effect, constituting another building. Even a slight addition, manifestly subservient to the original edifice, might, perhaps, be merely a repair. But a substantial addition of material parts, a rebuilding upon another and larger scale, constitutes a new building, even though some portions of the old are perceived and incorporated in the new." Here was a dwelling house, which, after the alteration, still continued to be a dwelling house. *Armstrong vs. Ware*, 8 Harris, 519, was the case of a church which was enlarged, but still continued to be a church. The intermediate case of *Landes' Appeal*, 10, Barr, 379, it may be difficult to distinguish upon the facts from *Driesbach vs. Keller*, yet the court do attempt to distinguish it, and do not profess to overrule that case. It is clear that it is the extent and character of the alteration, and not the mere change of the purpose of the building, which ought to make the difference. There are, doubtless, cases in which it would be hard to say on which side of the dividing line they are to be placed. The mere change of a common dwelling into a store would not be as material an alteration as that of an ordinary single house into a large costly dwelling, with a double front and extensive back buildings. A man builds a small weaver's shop to weave by hand-loom. He enlarges it to ten times its original size, and introduced power-loom. He may perhaps do so without disturbing a single brick or rafter of the old structure. It was a *factory* at first, it is still nothing but a *factory*, yet *the design of its character*, to use Judge Kennedy's phrase, has been as materially, nay, more materially changed than if it had been converted into a store or dwelling. The cost of the alteration in its proportion to the whole, might be small in the latter case, in the former it might be so great as to render the cost of the original structure itself but a small proportion of the whole.

We are satisfied that this principle in its application will do justice in this case. It would give priority to and serve the claims of the mechanics for work done on the first building, if there had been any such remaining unsatisfied. It gives priority to and secures the mortgage executed and put on record before the alteration was begun on the ground. As to the subsequent mortgages and incum-

branches, they have no equity against the intervening lien claimants, the jury upon one of the issues submitted to them, having found that the improvements were commenced on the ground before October 1, 1854. When these securities attached there was an enlargement of a very considerable nature actually in progress on the premises. They were bound to take notice of it and of its character. The same notice they would be obliged to submit to in the case of such an alteration of an old building as would constitute a new erection. The liens for claims for work done and materials furnished relate to the commencement of the alterations, not by the formation of the plan in the mind of the owner, not by the making of the contracts for the work, but by the work itself on the ground, open, manifest, and therefore, notice to all the world.

We think the auditor was right in rejecting the claim of Hooven and Ranckom. In a contest between mechanics and others for a fund in court, a judgment recovered by the mechanic upon a *sci. fa.* is as to the other claimants, *res inter alios acta*, and not even *prima facie* evidence. As a judgment it ranks merely from its date. To come in as a lien it must be proved so as to entitle it to relate to the commencement of the building. If such judgments were even *prima facie* evidence, honest mechanics might be defrauded with the greatest ease by the owners when they become involved, confessing judgments or allowing them to be entered against them, and it would be utterly impossible for strangers to controvert them. The exceptions of Hooven and Ranckom are dismissed. The other exceptions are sustained, and distribution is awarded according to schedule B, annexed to the report, the alternation table of distribution, the amount payable to Charles Norris on his mortgage of August 15, 1854, according to the principles of this opinion having the preference, but as the fund is sufficient to pay all the liens allowed, and also the first mortgage and part of the second, it is unnecessary to do more than decree distribution of the fund according to said schedule.

Exceptions of Hooven and Ranckom dismissed. The other exceptions sustained, and distribution of the fund in court decreed according to schedule B, annexed to the auditor's report.

THE

AMERICAN LAW REGISTER.

JUNE, 1857.

ENGLISH ADMINISTRATION OF THE CRIMINAL LAW.¹

From circumstances of which some are temporary and accidental, but others, it may be feared, belong to the system of our jurisprudence, a more than ordinary anxiety prevails at the present time respecting our criminal law and its administration. This feeling has given rise to considerable alarm; and the usual effect of such a state of mind in the community has been, great exaggeration of the facts really existing, and a more than ordinary amount of fiction and thoughtlessness; of things supposed that had no reality; of consequences deduced from the object of apprehension, which had no manner of connection with it. Thus, all offences were imagined to be committed by convicts liberated before the term of their punishment had arrived; and, though it is impossible to deny that some were suffered to go free without due precaution before their discharge, or without needful supervision after it, the very same evils were plainly to be apprehended from the liberation of the great majority of culprits whose entire time of confinement had elapsed.

That some course must be taken by the legislature for improving our system of secondary punishments, either by partial recurrence

¹ From the London Law Magazine for February, 1857, p. 353.

to transportation, by well-devised plans of forced labor, or by more adequate terms of imprisonment, or by all these means combined, appears now nearly certain. But those who are the most convinced of that necessity, whatever difference of opinion may divide them as to the measures required, must agree in this, that the existing law ought to be administered with even more than ordinary care; that pains should be taken to prevent the introduction of erroneous maxims in the proceedings of criminal courts; and that the high and most delicate office of the executive power in respect of sentences pronounced by the judicial authorities, should be watched with an anxiety proportioned to the danger which must attend erroneous views in this important matter. When those who, like ourselves, have the duty cast upon them of examining the judicial and administrative processes of the day, see reason to question the soundness of either the views upon which courts act, or those which guide the government, it is their bounden duty to state their opinion firmly, though respectfully, and to bring the subject under the notice of the legal profession, indeed of the community at large. Some things have lately occurred which seem to call for such discussion, either because dangerous oversights have been committed by judges and juries, or because the power of remitting punishments, sometimes of changing them, should seem to have been exercised upon mistaken principles. We assume that all must be agreed in favor of a stern, unbending execution of the law for repressing the offences attended with violence, now so generally complained of, and that the false humanity, always to be put aside in dispensing the criminal law, is more peculiarly out of place when this class of delinquency has assumed more than ordinary proportions. If the published accounts of such trials are wholly erroneous (and we have taken great pains to consult and compare them,) then it is another instance of false humanity, if courts do not protect their proceedings from such misrepresentation, not only because the character and authority of the judges are thus impaired, but because a dangerous inference is suffered to mislead the community, and to encourage offenders by concealing the hazards to which their

crimes expose them. The first observation to which the attention of the reader is directed, arises upon a late trial for an aggravated assault.

The prisoner, a young gentleman, apparently of dissipated habits, was proved to have inflicted a severe wound upon a young woman, probably of the town; and the question, indeed the only possible question in the case, was whether he had or not given the blow with intent to do grievous bodily harm. That an aggravated assault had been committed there was no doubt pretended to be raised; the question was, whether a felonious act had not been committed. The crime was this: He had come out of a cassino, and showing a large clasp-knife, with a blade five inches long and exceedingly sharp, to a policeman, he said in a wild and vaporing manner, "If the landlord comes out I will stab him to the heart." The policeman took the knife from him and shut it, saying he must be in jest, and advising him to go home; but he said he should stab every one he met, and, before the man could seize the knife again, the prisoner accosted the girl with foul language, and on her saying she knew him not, he asked how she would like that, showing the knife, with which he instantly made a thrust at her, and inflicted a wound in her groin three-quarters of an inch long, cutting through her dress, and causing her to bleed profusely. At the trial, ten days afterwards, the girl was still suffering very much, and was carried out of court. She swore that she never had seen the prisoner before, and that nothing else had passed than the threat and the attack. The surgeon proved that the wound was dangerous; and the policeman said that the prisoner seemed thunderstruck at what he had done, when he saw the poor girl bleeding, and called himself a drunkard and a blackguard. There was not the least attempt even to prove him drunk; the only reliance for his defence lay upon his friends, and three officers, with whom he had served in a militia regiment, describing him as a quiet, inoffensive young man. The learned judge apparently did not, the jury certainly did not, consider the charge proved of intent to do grievous bodily harm; and he was sentenced, as for an aggravated assault only, to a year's imprisonment, with hard labor. He was proved by his friends to be only

eighteen years of age; but he had joined the regiment above a year before. The knife was proved to be of a dangerous nature from its size and sharpness, and it closed with a clasp. We take leave to consider the facts, if there be no question of sanity, and none was even hinted at, quite sufficient to prove, according to every principle of law, the intent to do grievous bodily harm; and we regard it as productive of the very worst possible consequences to shake the known rule, that every one must be held to intend that to effect which his actions have a natural—it was here an inevitable—tendency; but say only a natural and probable tendency, and the thing done converts this probability into certainty.

It was impossible the jury should have acquitted the prisoner of wounding with felonious intent, unless upon one or other of four suppositions, assuming his sanity not to be in dispute: *first*, that he only brandished the knife, and that the girl ran upon it; *secondly*, that he hit her but in play; *thirdly*, that he intended only to give a slight cut or scratch; *fourthly*, that he was drunk, and had not any precise intention. The *first* supposition is negatived by the whole evidence; that of the policeman as well as of the girl herself, both concerning the prisoner's words, his previous demeanor, and the act itself. Indeed, upon this supposition, there ought to have been an absolute acquittal; for it negatives not only the felonious intent, but all criminal intent, and reduces the act either to that of the prosecutrix herself, or to *chance medley*. The *second* supposition is wholly inadmissible as a ground of negating the intent; because he was bound to know that such an instrument, if used to give any blow, might do grievous harm, as much so if used in play as if used with a serious design; and it is wholly impossible to draw a line, so that a certain degree of harm may be done in play, and anything beyond it is deliberate. The *third* supposition is as inadmissible as the second; for this plain reason, that the wrongdoer runs the risk of his act exceeding his intention, as much as of its exceeding his calculation; and nothing could possibly be more mischievous, than introducing the least subtlety or refinement into the question of men's intentions. If a man fires a pistol into a crowd, and death ensues, he is guilty, not of man-

slaughter, but of murder ; and cannot be heard to aver either that he had no intent to kill, or that he did not believe he should hit any one. So if one, meaning to wound but no more, gives a blow that produces death, it is murder, though his intent of only wounding be admitted ; and though his calculation, that the wound would not be mortal, be allowed to have had some foundation. It is possible that the learned judge may not have pressed this upon the jury with sufficient force, or with due precision. Certainly, if the reports which appear of the trial be correct, he concluded the "evidence of intent to have been slight ;" but the act itself furnished sufficient evidence if its nature was such that bodily harm most probably would ensue from it, because the party doing that act must have been taken to know its consequences. Possibly the judge's attention had not been sufficiently called to the manner in which the knife, exceedingly sharp and five inches long, penetrated through the girl's dress or thick petticoat. But we come to the *fourth* supposition, which requires a few observations.

There was no evidence given of intoxication ; but it is possible that the jury may have taken into their consideration the extravagance of the prisoner's conduct, and his exclaiming that he was a drunkard. The learned judge most fully stated that drunkenness was no defence ; but he appears not to have sufficiently explained to them that it was to be laid out of view in considering the question of intent. We assume that he held the sound opinion, as we very clearly hold it to be, that intoxication is no more to be regarded on the point of motive or intent, than it is on the general question of guilt. But we are aware that in some late cases a doubt has been thrown upon this subject ; and we hold it as exceedingly unfortunate that any such doctrine, if it can be so termed, should have been countenanced, or even suggested. If a person commits an offence while under the influence of such beastly intoxication that he was wholly ignorant of what he did, there cannot be a doubt that he is treated exactly as if he had been perfectly sober. Why is it so ? For this reason—that the condition in which he was had been caused by his own voluntary act, and therefore could be no defence, nay, could not be taken into consideration at all, and

that he was answerable for all he did in that state. But this is not the whole ground of the rule. The consequences of allowing such a defence are most material points, the foundation of the rule; for, if drunkenness were admitted to excuse crimes, all criminals must escape punishment by adding intemperance to their offence. Then surely the very same reasons, both the one and the other, apply to the proposition, that in judging of a party's intent the condition into which he had voluntarily thrown himself must be dismissed from our view. In truth, the question of guilty or not guilty is transferred to the question of intent, and no reason can be assigned for allowing intoxication to cast doubt upon the intent, that might not be equally given for allowing intoxication to work a general acquittal. One of the cases referred to in considering this subject was of a peculiar kind, and is wholly inapplicable to the general question. In *Queen vs. Moor*, 3 Car. & Kir. 319, the chief justice (Jervis) considered that the prisoner, who was tried for an attempt to commit suicide, being found to have been so drunk as not to know what she was about, it could not be said that she contemplated self-destruction, and there was an acquittal. Strictly speaking, there may be more than a doubt if this direction to the jury was right; but, at any rate, the thing done was no offence at all; the whole crime consisted in the intention; and there is not the same certainty given to that intent by the act itself, as where a crime has been committed. If death had ensued, it seems clear that the state of deceased, when she was found to have meditated self-destruction, could not have been held to overrule that proof, when the question arose before the coroner. The great mischief of any rule being laid down which tends in the least to weaken the guards against intemperance as the cause of offences, need hardly be dwelt upon. The increase of outrages committed under the influence of intoxication, has been very remarkable of late years; for there can be no doubt that the outrages, so much and so justly complained of as more frequent than formerly, have in most instances been committed by drunken persons. It becomes, therefore, the bounden duty of all magistrates to avoid even an approach to the infringement of the rule which peremptorily excludes such a defence in all cases;

and we must regard the very anomalous dicta to which we have been referring as somewhat like an infraction of the rule. Even in the case cited, if the woman, having had a quarrel with her husband, and been turned out of the house to prevent her from attacking him, had, instead of attempting to drown herself, rushed upon him and inflicted a mortal wound ; her drunkenness never could have been even given in evidence upon the trial for murder, and could only have been urged as some ground for a mitigation by the crown of the capital sentence which must have been pronounced by the court. It is difficult, then, to understand how the same state of intoxication could be taken into the account on the question, what were her intentions on throwing herself into the well, which could not even be listened to on the other question of intention, whether she killed her husband of malice aforethought.

The age of the prisoner in the stabbing case was very properly in all likelihood, not allowed to have any weight either with the jury, or in awarding the punishment on conviction. A person who had for a year been in the command of soldiers, could expect no benefit from such a topic. Indeed, it was probably recollected, both by the court and the jury, that about the same time a foreign seaman, of the same age, had been capitally convicted of murder, and that all attempts had failed to obtain a commutation of the sentence, the grounds of the application having probably been, not so much the lad's age, as his having been drawn or frightened by his elder associates into a participation of their guilt. The sentence of a year's imprisonment with hard labor in the case on which we have been commenting, has perhaps met with no disapprobation in any quarter on account of its severity. The prisoner's family gave, very properly, the sum of fifty pounds to the poor girl who had been so cruelly treated.

The subject of remission or commutation of punishment, to which we have just alluded, is one that urgently requires to be at least fully considered. Nothing can be more unsatisfactory than the manner in which this high prerogative of the crown is exercised. We do not in the least mean to complain of the excellent and able persons who perform the duties of the Home Department; but we

believe the opinion has become very generally prevalent, that the arrangements of the system are extremely faulty, both because the work of inquiry into the merits of each case is to be done without adequate assistance, and because the discretion vested in the office is exercised without any control or supervision.

It is necessary, first of all, to consider the great number of cases which must continually be brought before the Home Office, and must be disposed of either by the chief or some subordinate, probably the Under-Secretary of State. All the applications of convicts by their friends; the not rare interposition of humane persons, or persons who have strong feelings, and indeed opinions regarding punishments; the cases on which the judge had doubts, and suggested further inquiry, as well as those which he deemed fit for a merciful dispensation; the cases which others, and the officers of the department themselves, may think deserving of notice upon seeing reports of the trial,—all this investigation, anxious as it must be, laborious as it ought to be, is required of those whose other duties, both administrative and parliamentary, are sufficient to occupy their attention and indeed to employ their time. It is only by accident that the chief is a lawyer, and then he must rely upon an irresponsible subordinate. In all cases, no doubt the judge is consulted; but it often must be a question how far his opinions should be deemed conclusive. Then let it next be considered how many punishments are arbitrary, that is, in the discretion of the judge. In all cases of misdemeanor, and, as the law now stands, in almost all cases of felony, it depends upon the judge to what amount of punishment, most commonly indeed to what kind of punishment, the person convicted shall be sentenced. But there are fifteen judges, quite four times as many chairmen of Quarter Sessions, and about an equal number of Recorders; let us, however, only say the fifteen judges of the supreme courts. These may act on very various views of what is just and fit in apportioning the punishment to the offence. When the committee in the House of Lords, some years ago, examined the judges of the Court of Bankruptcy upon the important question of class certificates, it appears by the printed evidence¹ that these

¹ Report, 1853.

learned and experienced persons differed materially in the principles upon which they made their adjudication. It is certain that, if the criminal judges were examined in the same way, they might decline answering general questions as to the views which governed them, and would most probably say, "Each case must depend on its own circumstances;" yet if their opinions were sifted by the suggestion of particular instances, and one after another were asked how he would punish such an offence, proved to have been committed in such circumstances, there would be found no little discrepancy in their answers—those answers being concealed from each on all being examined successively. Therefore, it is manifest that a considerable latitude must, of necessity, be left to the Home Office, in deciding upon the matters brought before it, even in cases where the help of the judge is obtained. We may observe in passing, that a very powerful argument is raised, by the matter which we have just been stating, in favor of a Minister of Justice, whose watchful superintendence of all proceedings before the judges may be required to preserve uniformity of decision, not indeed by overruling the opinion of the judges, but by friendly and confidential discussion with them.

It must now be further stated, that beside the excessive labor, rendering a full examination of each case impossible, the system leaves too much to the discretion of the office. All authority exercised without control is liable to be abused; and we of course speak of no corrupt or unworthy influences as at all likely to interfere; but there is abuse if prejudice, preconceived opinions as to punishment, judgment too stern or too compassionate, or an alternation of severity and tenderness, nay, what may be termed caprice, shall be found to influence the decisions of the office. Nor is the possibility of this occurring lessened when we find it laid down as a rule in Parliament, that no explanations shall be given of the grounds upon which mercy has been extended to one case, and withheld from another. It is said that this would be an interference with the high and delicate office of administering mercy. Some years ago a person in the city was convicted of murder; he having rushed upon an eminent merchant and shot him dead with a pistol. It appeared soon after that he had been suffered to go free, and he went abroad;

no explanation was given. Very lately a woman was convicted of an atrocious murder: she had, with the greatest deliberation, killed her child, eleven years of age. The capital punishment was remitted. To the Italian lad's case we have already referred; there the sentence was executed. Now it is very likely that but for the rule against giving any explanation as to the grounds whereon the prerogative of mercy is exercised, reasons might have been assigned for the determination of the department in all these cases. Nevertheless, we cannot avoid applying Lord Coke's maxim to the administration of the law, as well as to the law itself. *Plus laudatur quando ratione probatur.*

There may be considerable difficulty in devising such an arrangement as may afford to the department the needful information, and subject it to the desired control. Nor, when we speak of control are we to be understood as meaning anything like an absolute veto upon the determination of the officer of State; but, in the greater number of cases, he would certainly adopt the suggestions of an able, learned, and experienced board, which ought to be composed for example, of a chief judge and two puisnes, taking the work in rotation. If, indeed, the legislature shall at length accede to the general desire among all friends of legal amendment, and of the most respectable men out of the profession, no less than of the legal authorities, and shall establish a Minister of Justice, he would of course preside over the department; and to him, as a minister of the crown, would naturally be transferred the power now vested in the Secretary of State. But, of course, neither would he be bound by the opinion of the other members of the board, nor would the crown be bound by his decision, any more than it now is by that of the Home Department.

This leads us to remark, that in what we are now suggesting, there is no interfering with the prerogative. The eminent and transcendent office of dispensing justice in mercy would still be vested, absolutely and entirely vested, in the sovereign, to be exercised, of course, like all the prerogatives, by the advice and through the hands of responsible advisers,—so of the crown's right in appeals; it has always been exercised through the Privy Council,

forming that Council at large in different committees. Of late its Judicial Committee hears and determines causes of the greatest importance, and criminal as well as civil causes; and though the judgment is given by the sovereign, yet, in all cases, it is given in conformity to the committee's recommendation. In 1832-33, great changes were introduced when the Court of Delegates and Commission of Review were abolished, and the hearing of causes was confined to certain members of the Privy Council. But no objections were made to these important measures on the ground of their touching the prerogative. Nor could any the least objection be urged to the improvement we have been suggesting, upon the mode and manner of exercising the power to remit or commute sentences.

RECENT AMERICAN DECISIONS.

In the Circuit Court of the United States, April Term, 1857.

BAZIN vs. THE LIVERPOOL AND PHILADELPHIA STEAMSHIP CO.¹

1. Where A makes a contract in the form of a bill of lading, in which B, the ship-owner, undertakes to send forward A's goods by a particular ship at a particular time, the shipper is entitled to have the very contract made fulfilled, and if B, the ship-owner substitutes another ship instead of the one stipulated for, he has substituted different risks, and will be held as an insurer against all loss from whatsoever cause.
2. The rule by which damages are to be assessed against a carrier, where the shipper's goods are lost through his ignorance or want of care and skill, is their net value at the port of delivery. The carrier is not liable for any speculation or possible profits, which the owner might have anticipated in his peculiar business.

This was an appeal from a decree in the admiralty, in which a party claimed compensation from ship-owners for his goods lost at sea, while on their vessel. The case was thus:

Bazin, the libellant, was a retailer of French perfumery, in Phila-

¹ From the MS. of 3d Wallace, Jr.

delphia. Being in Paris in 1854, he purchased a large stock of goods for his business in America, which were shipped from Havre to Philadelphia. The respondents were the owners of a line of several steamships sailing between the ports of Liverpool and Philadelphia. For greater regularity and convenience of passengers and traders, the vessels sailed at regular intervals, from these ports; certain vessels being usually named for certain days, when it was convenient so to do; but there not having been, apparently, any contract with the public that special vessels should sail on special days. The Steamship Company had their agents stationed at *Havre*, authorized to receive goods meant to be sent from France to the United States, and to issue bills of lading. On the 28th of August, 1854, their agent at Havre gave the libellant a bill of lading, containing the following clause, viz: "*Received in and upon the steamship called the Shamrock, whereof is master for the present voyage, Little, or whoever else may go as master in the said ship, and now lying in the port of Havre, and bound for Liverpool, eighteen cases of merchandise; the said goods to be transhipped at Liverpool on board the Liverpool and Philadelphia steamship City of Manchester, or other steamship appointed to sail for Philadelphia, on Wednesday, the 6th day of September, and failing shipment by her, then by the first steamship sailing after that date, for Philadelphia; and are to be delivered in like good order and condition, at the aforesaid port of Philadelphia.*" The bill of lading was quite formal in several other specifications, as to the mode of landing the goods, &c., and contained exceptions against loss by "the act of God, the Queen's enemies, Pirates, restraints of Princes and Rulers, fire at sea or on shore, accidents from machinery, boilers, steam, or any other accidents of the seas, rivers and steam navigation, of whatever nature or kind soever."

The respondents also owned, as one of their line, another steamship, called *The City of Philadelphia*, which was appointed to sail on the 30th of August, 1854, for the port of Philadelphia. The libellant's eighteen cases by the Shamrock, from Havre, arrived at Liverpool in time to put them on board of *The City of Philadelphia*, and they were so dispatched a week before the time that was pro-

vided for in the bill of lading, on a different vessel. The respondents accordingly shipped *sixteen* of them by her; the other *two* were afterwards shipped by *The City of Manchester*, on the 6th of September, 1854. The City of Philadelphia sailed on her first voyage, bound to Philadelphia, on the 30th of August, 1854. On the 6th of September, 1854, while on her voyage, she struck the point of Cape Race, and was wrecked. Two of the cases were entirely lost, and others much damaged; while the two cases not put on board the Philadelphia, arrived in The City of Manchester in due season, and in order.

The evidence as to the sea-worthiness of the ship, and as to the cause of the disaster, was that of the captain, and as follows: "She was a new ship. I saw her in course of construction. She was built of iron, of the very best description; the character of the workmen stood very high on the Clyde; the naval constructors and workmen were of high character. She was in every respect a sea-worthy vessel, at the time she started on her voyage. No expense was spared in fitting her up properly. She was well rigged and well manned; she continued sea-worthy. *She struck the point of Cape Race*—up to that time she continued perfectly sea-worthy. If she had not struck, at the average rate of our passage, we would have been in Philadelphia in five days more. The steamer was wrecked. We backed off the point of Cape Race, and run her on shore to save the lives of the passengers, and to keep her from sinking. *There was no tempest; she struck in a dense fog*—and the sinking of the vessel, and the damage done, resulted from her striking the cape."

No other account was given of the cause of the loss; and it was supposed that the iron vessel had caused the needle to deflect. The vessel was between thirty and forty miles out of her proper course when she struck.

There was no proof, except as it was given by the bill of lading, that Bazin knew anything about the respective vessels, or that he had preferred one vessel rather than another. His libel, however, alleged that "some time previous to the day of shipment, he had by letter directed his agent in France to send his goods by The City

of Manchester, to sail from the port of Liverpool on the 6th day of September, 1854, *knowing her to be a safe and reliable steamship, and under skillful management*; and that when in France, he had personally given the same orders, and made all his arrangements accordingly." The *answer* of the Steamship Company, stated that "the substantial and exclusive object of the contract, as understood between the parties, and as appears upon the face of the bill of lading, and as understood by the usages of trade, was to transport the eighteen cases of merchandise named therein, to Philadelphia, in the United States, in the *shortest time, and in the earliest steamer*, after the merchandise arrived from Havre." "The particular steamship," they answered, "which was to sail on the 6th of September, being named in the said bill of lading, was so named, inasmuch as the parties to the contract had reason to believe, from the usual facts which were incident to forwarding goods from Havre to Liverpool, that the *first* steamer to sail *after* the arrival of the merchandise would be The City of Manchester." They alleged, "that had The City of Manchester, which was advertised to sail on the 6th of September, been for any cause unable to proceed upon her voyage, they would, either by some other vessel to sail on that day, or by the first vessel sailing after that day, have shipped the said cases direct to Philadelphia. But that the cases arriving from Havre in time for shipment by The City of Philadelphia, which sailed on the 30th of August, the respondents, in the diligent and faithful discharge of duty, desiring that the libellant should receive his goods in the shortest possible time, and in compliance with the customary mode of the particular business of the respondents, and settled usage of trade in this respect, shipped sixteen of said cases, safely and in good order, upon The City of Philadelphia, rather than permit the same to lose an entire week by remaining on deposit in Liverpool, for the sailing of the vessel appointed for the 6th of September.

A witness was examined by the respondents, in order to confirm this view, and to show a custom varying the obligation to comply with the terms of the bill of lading, and to show, that in forwarding the goods more expeditiously than they would have done by complying with those terms, they had acted in a usual and legal way, and

one always desired by shippers. His testimony was thus: "According to the best of my knowledge and belief, there does exist at Liverpool, *a general usage, custom and practice*, amongst forwarding companies, as respects the time, order and manner of the shipment of goods sent to them, to be carried to the United States of America. Such general usage, custom and practice is, that the goods so sent for shipment should be shipped to their place of destination with all dispatch, and, if possible, by the *first vessel of the company then next sailing*, in order to get the goods into the foreign market with every expedition, for the benefit and advantage of the shippers or consignees; I believe the British and North American Royal Mail Steam Packet Company, commonly called the Cunard Company, recognize and adopt this custom and usage, and I am not aware of there being any other British steam shipping Company, having steamers for business purposes, between Liverpool and the United States of America. I am not aware of any other general rule, order, practice, usage or custom, other than what I have deposed to, which has existed ever since I have been in the employment of the Company, about three years; it is not a secret practice, usage or custom, but, so far as I know, it *is generally known to the shippers* by the said Steamship Company's vessels. I first became aware of the fact that such custom existed at the time when I took charge of that department in the office of the Company, which enabled me to have a knowledge of such custom by my intercourse with parties conducting business. I cannot state when this custom first arose, although I believe it has been of long standing, nor can I state, except as I have already done, amongst whom it prevails, nor whether it is subject to any, or what exceptions. I believe, and I have no doubt it is the fact, that shippers do frequently designate particular ships or vessels to carry their goods, but I say that I do not know, and I do not believe, that there is amongst shippers a preference sometimes for particular ships of the same line, or the masters commanding the same, and I have not known instances in which shippers have delayed sending goods by a particular ship when there was full opportunity to do so, in order that they might go or be shipped by some other vessel sailing at a subsequent time,

which they, for any reasons, preferred, except in such instances where several ships belonging to different parties are destined for the same port, to sail about the same time, and in those instances, I believe, a preference is given to a ship of the first class, in preference to a ship of a minor class, although the ship of the first class should be advertised to sail some days after the ship of the minor class; but in the case of this Company, all their vessels are of the first class, and are all commanded by masters of reputed skill and experience, and no preference is made by shippers as to whether their goods are to be shipped by the one vessel or by the other, and in all instances, as far as I know and believe, the shippers expect and rely upon their goods being shipped by the first vessel, regardless of her name or of the name of her master."

Upon this case, the District Court decreed *pro forma*, in favor of the libellant, Bazin, for the original cost of the goods, adding expenses and cost of transportation, with seventy-five per cent., that being proved to be a fair sum or rate for "anticipated business profits."

Mr. Webster and *Mr. H. M. Phillips* for the libellant, now made the following points:

1. That the bill of lading formed an absolute contract to ship libellant's goods by *The City of Manchester*, sailing on the 6th of September, 1854; and that any shipment of them by the respondents prior to that time, was at their own risk, and in violation of the contract.

2. That no usage prevailing at Liverpool could vary an express contract, more especially one made at *Havre*, where no knowledge of such usage was shown to exist.

3. That assuming that the respondents had the right to ship by *The City of Philadelphia*, they were nevertheless liable, since they had failed to show that she was lost through any of the perils excepted in the bill of lading.

4. That the measure of the libellant's damages was the market value of goods here, at the time they should have been delivered, in estimating which there was to be added to the original cost, not only duties and charges, but an allowance for the advance in value

which they acquired in the market, the moment they were in condition to be sold, whether called profits, or by any other name.

On the part of the respondents, *Mr. J. M. Rush* contended as follows :

1. That the receipt for the goods given in Havre, was not a maritime contract, but only an engagement preliminary to a maritime contract, and therefore not within the admiralty jurisdiction of the District Court.

2. That the respondents were not bound to *detain* the goods in Liverpool to await the sailing of the *Manchester*, but under the law, as well as from usage, it was their right as well as duty, to send them forward by The City of Philadelphia.

3. That anticipated profits could not be recovered, but only market value, or the amount it would take to replace the goods.

The opinion of the court was delivered by

GRIER, J.—The objection that the contract is not a maritime contract, cannot be supported. The case presents a bill of lading by which defendants bind themselves to carry goods received at Havre, and deliver them in Philadelphia. It is a contract for a maritime service, and it would be difficult to say what is a maritime contract if it be not one. If it had been merely an agreement by respondents with libellant, that if he would send goods by their line, they would receive and forward them for a certain consideration, and the breach of the agreement was in refusing to receive or transport the libellant's goods at all, or for the consideration stipulated, then this first objection of the respondents would apply. But when the respondents have received the goods on board their vessel, and given a bill of lading to transport them across the ocean, it can hardly be called a preliminary agreement to a maritime contract, and not the contract itself.

The case then presents these two questions on the merits.

1st. Are respondents liable?

2d. If so, what is the rule of damages, and how is their amount to be ascertained?

The reason given by the answer why The City of Manchester

was named in the contract, may possibly have been the true one, or that assigned by the libel, to wit: that the libellant "directed his agent in France to send his goods by The City of Manchester," which was advertised to sail on the 6th of September, *because he knew her to be a safe and reliable vessel, and under skillful management.* But we need not search for any reason, "*Stet pro ratione voluntas.*" The libellant may, in fact, have had no better reason than that he believed The City of Manchester to be a *lucky vessel*, or he may very justly have preferred a tried boat and crew to a new iron steamer, whose officer or whose compass had not been tested by a trip across the ocean. Reason or no reason, he had a right to have his contract fulfilled according to its stipulations, and the result has shown that if such had been the case, his goods would have arrived safely. If the goods had been sent by the Manchester, the risks excepted in the bill of lading would have been borne by the libellant. For them he was his own insurer, and the carrier of those not excepted. If the carrier changes the vessel and the time of dispatching the goods, he has substituted different risks from those stipulated by the parties, and should be held as insurer against all loss, from whatsoever cause. The loss to libellant is a result of defendant's breach of contract. But, assuming that the libellant had no good reason for desiring his goods to be sent by a particular vessel, and that the insertion of the name of the Manchester was merely *pro forma*, to fill up the usual blanks in a printed bill of lading, is there any evidence whatever that the goods were not injured in consequence of any accident excepted in the bill of lading?

The respondents aver that the ship was seaworthy in every way; the libellant denies the fact in his replication. The testimony of the captain shows his steamboat to have been *new*, made of iron, tight and staunch, well rigged and manned. The only account given of the loss of the vessel, was as follows: "She struck the point of Cape Race; up to that time she continued perfectly seaworthy. If she had not struck, at the average of our rate we should have been in Philadelphia in five days. The steamer was wrecked. We backed off the point of Cape Race and run her on

shore to save the lives of the passengers, and to keep her from sinking. There was no tempest. She struck in a dense fog; the sinking of the vessel and the damage done, resulted from her striking the cape."

Here then we have no other reason given by the captain, nor any testimony whatever, as to how or why this great mistake of running against a cape occurred. The answer and the witness *both seem* to assume that running against a cape or a continent is one of the usual accidents and unavoidable dangers of the sea. That cannot be termed an "*accident of the sea*" within the exceptions of the bill of lading, which proper foresight and skill in the commanding officer might have avoided. If the compass on the new iron vessel was not sufficiently protected to traverse correctly, the vessel was as little seaworthy as if she had no compass—and this should have been carefully ascertained before she started on her voyage. If there was no fault in the compass, then it is very evident that the officer who is thirty or forty miles wrong in his calculation, and driving through a thick fog with a full head of steam, and first discovers his true position by running on an island, a cape, or a continent, has neither the skill nor the prudence to be entrusted with such a command—and for want of such an officer the vessel is not seaworthy.

The loss of the goods committed to a carrier and in possession of his servants, puts the burden of proof on him, to show how it took place, and that it was not by their fault, but in consequence of some of the unavoidable accidents excepted in the bill of lading.

The respondents have not alleged or proved any one fact tending to relieve them from responsibility. That a steamboat has been either ignorantly, carelessly or recklessly dashed against a cape in a thick fog, cannot be received as a plea to discharge the carrier. Yet for any thing that appears—such is the case before us. If there were any circumstances tending to lead to a contrary conclusion, they are not in evidence in the case.

II. The rule of damages in these cases is, that the carrier shall pay for goods not delivered their net value at the port of delivery. He is not liable for any speculation or possible profits which the

owner might have anticipated in his peculiar business. Thus, suppose the carrier liable for non-delivery of a hundred barrels of flour at Philadelphia on a given day, and on that day flour is worth five dollars a barrel, the amount of the owner's damage is clearly just \$500, because he could have bought a hundred barrels of flour and supplied his loss for \$500. The owner cannot be allowed to show that he was a baker, and could in a few weeks have cleared ten dollars a barrel by manufacturing his flour into bread. The sum of money which represented the net value of the lost articles, with interest till paid, is all that can be recovered from the carrier when goods have been lost in the course of transportation. And as the owner would have paid freight as a deduction from the net value of his flour, so when the carrier pays its value, he will be entitled to have his freight deducted, if it has not been paid.

In all cases when the article to be delivered has a definite market value, the application of the rule is without any difficulty.

The libellant keeps a variety store in Philadelphia. The eighteen cases contained a selection of ten thousand articles of perfumery, &c., &c., to be found only in such shops. They are retailed generally at one hundred per cent. profit on the original cost in Paris. But few, if any, of these numerous trifles have any known wholesale or market value in Philadelphia, nor could libellant have supplied himself with the lost goods most probably in the Philadelphia market at any reasonable price. How, then, are we to arrive at a rule of damages to ascertain the amount of loss to libellant for the non-delivery of his articles? Certainly not as contended by his counsel, by taking the original cost, adding expenses and charges of transportation, seventy-five per cent. "*for loss of anticipated profits.*"

If these articles, like most other goods and wares, had a known value in market here, for which they could be purchased, the original cost and charges of transportation would have nothing to do with the calculation. But as such is not the case in the present instance, we must inquire what was the original cost and what the charges of transportation, &c., in order to arrive at their value here; or more properly, what would it cost to get other goods of precisely the

same value in place of those lost. Now, we may assume (as nothing is pretended to the contrary) that a bill for the very same sort of articles which Mr. Bazin has purchased could be filled in Paris for the same sum of money. In less than sixty days, every article not delivered here by the carrier, could be put in Mr. Bazin's shop, for the same price which he has paid for them. But he will have lost only the interest of his money for sixty days longer. How much profit he might have made by retailing them, or what the amount of "*anticipated business profits*," being matters not capable of certain ascertainment, cannot make a part of the consideration. Legal interest is all that the law knows as the damage for detention of money. As the goods lost, therefore, have no market value here, and could not be purchased in our market, their value must be ascertained by adding costs and charges, and sixty days' interest on this sum. From this amount deduct freight, which is unpaid, and add interest on the balance till judgment.

If counsel can agree upon the amount of damages calculated on these principles, the decree will be entered for such amount; if not, the case will be referred to a master to report.

In the Supreme Court of Pennsylvania.

PAGE vs. DENNISON.

1. The mother of a child born in wedlock, but begotten before, is not a competent witness, to prove that the child was not begotten by the man who became her husband before its birth, in the absence of evidence of non-access.
- 2 Where no evidence of non-access at the time of conception was given, the declarations and acts of the husband and wife at the birth of the child, and subsequently, were inadmissible to prove it illegitimate.

Per LOWRIE, J., dissenting—

1. In an inheritance case, where the claimant was begotten before and born after marriage, the mother is a competent witness to prove that her deceased husband, whose estate is the subject of the claim, was not the father of the claimant.
2. Where a child was begotten before and born after marriage, and at the time of its birth, both the mother and her husband denied that it was his child, and it

was, within a few days, sent away from his house and reared by its maternal grandfather, and never admitted into the family of the husband, nor reputed as his child; this is evidence, in an inheritance case, that the child is illegitimate.

8. Presumption on the subject of legitimacy, examined historically and on principle.

Error to the Court of Common Pleas of Fayette county. Partition.

The case was tried before GILMORE, P. J. The facts, so far as they are essential to an understanding of the points involved, are sufficiently stated in the opinion. The case was argued by

Kaine, for plaintiff in error, and

J. K. Ewing, for the defendant in error.

The opinion of the court was delivered by

KNOX, J.—Mary Dennison was born three months after the marriage of her mother with Samuel Page. Her right to any part of his real estate, was denied upon the allegation that he was not her father. To determine the question of her legitimacy an issue was certified by the Orphans' Court of Fayette County, to the Court of Common Pleas.

Upon the trial, the defendants offered to prove by Mrs. Mary Page, the mother of Mrs. Dennison, that Samuel Page was not her father; that she was begotten before the witness was married to Samuel Page, and that he did not beget her. The refusal of the Court of Common Pleas to receive Mrs. Page's testimony, forms the first assignment of error.

Where a child is begotten and born whilst its mother is a married woman, its legitimacy is presumed, until the contrary is clearly made to appear. This presumption can be removed by showing that the husband had no sexual intercourse with his wife at any time when it was possible for the child to have been begotten. Does the ante-nuptial conception weaken the presumption of legitimacy arising from the post-nuptial birth? It is well settled by authority that it does not. A child born in wedlock, though born within a month or a day after marriage, is legitimate by presumption of law.

Co. Litt. 244 a. And where a child is born during wedlock, of which the mother was visibly pregnant, at the marriage, it is presumed *juris et de jure* that it was the offspring of the husband. In *Rex vs. Luff*, 8 East, 193, Lord Ellenborough said, that "with respect to the case where the parents have married so recently before the birth of the child that it could not have been begotten in wedlock, it stands upon its own peculiar ground. The marriage of the parties is the criterion adopted by the law in cases of ante nuptial generation, for ascertaining the actual parentage of the child. For this purpose it will not examine when the gestation began, looking only to the recognition of it by the husband in the subsequent act of marriage." And in the same case, Le Blanc, J. said, "Our attention has been called to cases where a child born within a short time after the marriage of the parents, is by the rule of law considered legitimate. That is a rule of law not to be broken in upon, except as in other cases by proof of natural imbecility &c.

In *Stigall vs. Stigall*, 2 Brockenbrough, 256, the marriage preceded the birth about six months, and there was no reason to suppose it a premature birth, yet the case was treated by C. J. Marshall precisely as though the child was begotten in wedlock, making the question of legitimacy depend upon the access of the husband. In *Boules vs. Bingham*, 2 Munford, 442, the marriage took place in January, and the birth in the succeeding April. The opinion of the court, delivered by Judge Roan, is to be found in 3 Munford, 599, and it clearly establishes the doctrine that the presumption of legitimacy is the same where the child is born in wedlock whether begotten before or after. So in the *State vs. Wilson*, 10 Iredell, 131. And in the *State vs. Herman*, 13 Iredell, 502, the same rule is asserted and followed.

In the last mentioned case, where the child was born five months and two days after the marriage, Chief Justice Ruffin, in delivering the opinion of the court, said: "There seems to be no difference in point of law between a case where the conception was prior or posterior to the marriage, provided the birth be after wedlock, for that makes the legitimacy."

It follows from the authorities above quoted, that the legitimacy

of a child born in wedlock, though begotten before the marriage, is founded upon the supposition that it was begotten by the man who subsequently became its mother's husband, and that this presumption can only be rebutted by clearly proving that no sexual intercourse occurred between the two at any time when the child could have been begotten. Whether it was begotten in or out of wedlock, where the marriage precedes the birth, the presumption of paternity is the same, and the like evidence is required to bastardize the issue. That evidence is proof of non-access. Where the husband, or he who subsequently becomes such, has access to the mother of the child, the presumption that he is its father is conclusive. By the term access, used in this sense, we understand actual sexual intercourse; and this is presumed in the one case from the existence of the marital relation, and in the other from the subsequent marriage. Where marriage follows pregnancy and precedes birth, he who marries the pregnant woman is presumed to be the father of the after-born child. Upon this presumption rests the doctrine of the common law, that legitimacy follows birth in wedlock.

The question before the jury was, whether or not Samuel Page was the father of Mrs. Dennison? That he was her father, his marriage with her mother before her birth clearly establishes in the absence of proof of non-access. The proffered testimony in substance—though not in form—was to prove non-access.

That the mother was incompetent to prove this, is perfectly well settled by abundant and uniform authority. Non-access cannot be proved by either the husband or the wife, whether the action be civil or criminal, or whether the proceeding is one of settlement or bastardy, or to recover property claimed as heir at law.

I will mention some of the numerous cases where the question has been decided.

In *Rex vs. Rook*, Wilson, 340, which was a bastardy case, it was held that the wife could not be a witness to prove non-access.

The same point had been previously decided in *Rex vs. Inhabitants of Reading*, Cases Temp. Hardwicke, 82. *Rex vs. Luffe*, 8 East, 193, was also a bastardy case, and there Lord Ellenborough said that the rule which forbade the wife to prove non-access, "was

founded upon a principle of public policy, which prohibits the wife from being examined against her husband, in any matter affecting his interest or character." In *Goodright vs. Moss*, 2 Cowp. 591, where the question of legitimacy arose in an action of ejectment, Lord Mansfield said, "as to the time of the birth, the father and mother are the most proper witnesses to prove it. But it is a rule founded in decency, morality and policy, that they shall not be permitted to say after marriage that they have had no connection, and therefore that the offspring is spurious."

In *Cope vs. Cope*, 1 Moody and Robinson, 269, which was an issue out of Chancery, to try the legitimacy of Willis Cope, Justice Alderson said, "the wife is not allowed to prove the illegitimacy of the child, as by showing non-access." In the *King vs. The Inhabitants of Kea*, 11 East, 131, a settlement case, an attempt was made to prove by the mother, the non-access of the husband, on the ground that the husband was dead at the time of the trial, but Lord Ellenborough, with the concurrence of the other judges, decided that the evidence of the wife ought not to be received to prove non-access, whether the husband was living or dead when the evidence was offered.

In the cases already referred to in 10 and 13 Iredell, the evidence of the mother to prove non-access was held to be incompetent, and these were both cases where pregnancy preceded marriage.

The same rule is laid down by the elementary writers on evidence, Starkie, Phillips, Greenleaf and others, and to the same effect is our own case of the *Commonwealth vs. Shepherd*, in 6 Binney, 283. It is true that the same reasons are not always given for the rule. In some of the cases it is said to be founded upon the question of interest, and in others upon a question of policy, but whatever may be the reason for the rule, whether good, bad or indifferent, the rule itself is an inflexible one, and in no event can the wife be permitted to prove non-access of the husband. There was no error therefore, committed, in rejecting the evidence of Mrs. Mary Page.

But the defendant further offered to prove that Samuel Page said at the time of the birth of Mary Dennison, that she was not his

child, that he repeated this declaration afterwards, and added that she should never inherit any portion of his estate; that he was found in tears on the morning of the birth; that the mother said about the time the child was born, that it belonged to a man by the name of Risk; that on account of the difficulty as to its legitimacy, the child was taken, three days after its birth, to the house of its mother's father, where it was reared, and that it was treated by Mr. and Mrs. Page as illegitimate. This evidence was also rejected, and upon its rejection, is based the remaining assignment of error.

In considering the question whether there was any error in rejecting proof of the facts above stated, it must be borne in mind that at the time of the offer, no evidence had been given which disproved or tended to disprove sexual intercourse between Samuel Page and Mary the mother of Mrs. Dennison, at or about the period of gestation, nor was it proposed to follow the offer by such evidence. The parties had lived for many years before their marriage, within five miles of each other, but how long their acquaintance preceded their marriage, or whether or not they were frequently in each other's company, was not shown upon trial. That the declarations of Mr. and Mrs. Page, at or about the time of the birth, followed as they were, by the removal of the infant to the house of its mother's father, where it was raised as an illegitimate child, would have strongly corroborated evidence of non-access is, to my mind, very clear, but I am equally clear that the evidence was only admissible as corroborative, and that it was insufficient of itself to prove non-access.

It cannot be denied but that the conduct of Mr. and Mrs. Page, when the child was born, was unfavorable to its legitimacy, but the policy of the law so strongly favors legitimacy, that it is not in the power of either husband or wife, or both, to bastardize a child born in wedlock.

The old rule, that the presumption of legitimacy could not be overcome by any proof less than the absence of the husband beyond seas, previous to and during the whole time of gestation, no longer exists.

The modern rule is, that where the evidence plainly shows such

non-access, on the part of the husband, that he could not in the course of nature have been the father of the child, it is sufficient to destroy its legitimacy. But nothing short of this will bastardize one born in wedlock. *Rex vs. Luffe*, 8 East, 193; Foxcroft's case, 1st Rolle's Ab. 359; *Stigall vs. Stigall*, 2 Brock, 256. Declarations of parents may be given in evidence to prove or disprove marriage, where the parties have cohabited, (B. N. P. 112) or to prove whether the child was born before or after marriage; (*Goodright vs. Moss*, Cowp. 591) but they are not admissible to prove the illegitimacy of a child born in wedlock. 7 Martin 558, 2 Brock. 256. So a husband's declaration that a child born in wedlock is not his, is not sufficient evidence to prove it illegitimate, notwithstanding it was born only three months after the marriage, and a separation between the husband and wife took place by mutual consent. *Bowles vs. Bingham*, 2 Munford, 442. In *Morris vs. Davis*, 5 Clark and Finnelly, 163, the presumption of legitimacy was held to be rebutted by evidence of the conduct of the husband and wife, such as that the wife was living in adultery, that she concealed the birth of the child from the husband, and declared to him that she never had such child, that the husband disclaimed all knowledge of the child, and acted up to his death as if no such child was in existence; and also that the wife's paramour aided in concealing, reared and educated it as his own, and left it all his property by his will. But there was also in the case, evidence which tended strongly to prove that the husband had no sexual intercourse with the wife at the period of gestation; and in *Rex vs. Mansfield*, 1st Queen's Bench, 449, it was held that the fact, that the wife was living in adultery, was not sufficient to destroy the legitimacy of a child born in wedlock, but that there must be evidence from which a jury could find non-access. There are many other cases, English and American, bearing upon the question here presented; but it is unnecessary to cite them, for they are all consistent with the points ruled in the Common Pleas; which were, 1st, That the mother of a child born in wedlock, though begotten before, was incompetent to prove that the child was not begotten by the man who became her husband before its birth, in the absence of evidence of

non-access. 2d. That where no evidence of non-access at the time of gestation was given, the declarations and acts of the husband and wife at the birth of the child, or subsequently, were inadmissible to prove it illegitimate.

The following dissenting opinion was delivered by

LOWRIE, J.—We have only one rule of positive law applicable to this case, and that is, that lawful children shall be heirs of their parents. In case of dispute, it is the duty of the courts to investigate and decide who are the lawful children; and this is our present question. The law gives us no positive rules for deciding it, and therefore it is our duty to look to reason and experience for direction, and to receive in evidence all such facts as naturally tend to cast light upon the subject, and to admit as witnesses, all persons who are able to communicate such facts, unless experience excludes them as unreliable.

But are we indeed striving to ascertain who are the real children of Samuel Page, or only to ascertain and follow some old examples and maxims that would fix upon him an arbitrary and fictitious paternity? If the former is our purpose, then we are endeavoring to execute the law of inheritance, given to us by our superiors, the legislative power. If the latter is our purpose, then it seems to me that we are endeavoring to sustain, as positive law, the judicial glosses upon the law of inheritance, and partially to set aside the law which we are appointed to administer, by the false process which we adopt of arriving at the truth.

Here it is worth while to look a little into the history of jurisprudence on this branch of human relations: for, without this, we may fall, on one hand, into an ignorant and slavish formalism, or, on the other, into unintelligent and reckless innovation. With it, we may profit by the experience of predecessors, and avoid the errors which, to them, were inevitable. Without it, we are mere adventurers and pretended discoverers, repeating, to the injury of others, the very errors which the experience of the past ought to teach us to avoid. If we desire to sum up and be properly guided by the history of this particular point in jurisprudence, we must study to understand that history.

There certainly was a time in the progress of English jurisprudence, when the courts paid very little regard to the fact of paternity, and satisfied themselves with the facts of marriage and *maternity* in questions of heirship; and thus adopted the rule, that *he who marries a woman must father all the children afterwards born of her*. This rule has all the definiteness of positive law, and has the merit, at least, of being easily understood and applied. And as all positive law is received in barbarous times, according to the letter, and without the qualifications and distinctions of more refined periods; so it seems very natural to find that this rule was often applied, in ancient jurisprudence, with a strictness that is shocking to our modern notions. It was the adoption of the maxim by which a title to slaves and cattle is sometimes tried, *partus sequitur ventrem*; and it was put into plain Saxon in *John Flettesham's case*, 7 H. 4. 9. b., "who bulleth my cow the calf is mine." Possibly it was received with favor, because the ruling race found in it a mode of ascertaining the line of succession of their tenants, and their other rights of lordship, which was much more easily understood than any legitimate process of arriving at the real truth. It could hardly be expected to fit comfortably when applied to themselves, and it is said that parliament was, in many special instances, called upon to correct its injustice, and did so. And perhaps its simplicity had much to do with the answer of the barons, *quod nolumus leges Angliæ mutare*, when the bishops proposed to introduce the Canon law on this subject. 20 H. 3. c. 9. Certainly the answer proves no dislike of the Roman civil law: for that was not in question, and all the English law books written about that period, Bracton, Glanville, and Britton Fleta, exhibit for it a special fondness.

But this rule was the result of an abandonment or very defective performance of the judicial duty of investigation, and the substitution of an arbitrary rule, which proclaimed that there was no sympathy between the government and its subjects. But it could not stand, for this sympathy does exist; public justice demanded the truth on the subject of *paternity*, and gradually exceptions to this rule of evidence were allowed; first, when the husband was incompetent, and afterwards, if he was beyond sea during all the

period of his wife's gestation. This was some advance towards allowing the truth to decide the question. But it was very limited; for it was of no avail if the husband was so unfortunate as to return home even a week before the birth. Salk. 122, 284.

And it was the very spirit of this limitation that decided the paternity, if a man married a woman already *enceinte* by another, and where a woman eloped from her husband and lived in adultery with another man, or was married to him. Bro. Ab. Bastardy, 4, 8, 26. All these are samples of an ancient jurisprudence, that are now everywhere called absurd. But, absurd as they are, we are in danger of allowing their influence to be felt even in a more advanced state of society and jurisprudence, and of permitting ourselves to be guided by the opinions of judges who lived and spoke at a time when these decisions had not ceased to influence the legal mind; for a system generally retains the dregs of an error long after it has been discovered and condemned. Always, where judges have seriously undertaken to decide such cases according to the real truth, they have broken through the rule, and have sometimes succeeded in establishing exceptions to it, until at last it has almost entirely faded away; and it is by this sort of continual attrition, that nature always operates in wearing away whatever is anomalous and obstructive of systematic harmony.

And it is worthy of notice, that these decisions never had an absolute sway, for their flagrant injustice would necessarily prevent an entirely unbending application of them; and we find cases wherein a wife's elopement and living in adultery—40 Ed. 3, 16; 43 Ed. 3, 19 b; 39 Ed. 3, 14; 11 Ed. 4, 174; Lib. Ass. 33, 8; Bro. Ab. Bastardy, 21—and where the fact that the child was begotten by a stranger before marriage—18 H. 6, 31 b; 44 Ed. 3, 12 b; 45 Ed. 3, 28—were allowed their proper influence.

Let any one trace the development of jurisprudence on this subject, and he will discover that the original definition of a legitimate child has undergone an entire change. The definition, leaving out the case of posthumous children, was: one born in lawful wedlock. Put this into another form, and it is plainly this: *one whose mother was, at the time of its birth, a married woman.* Paternity is not

at all regarded. But exceptions were gradually admitted, that paid some little respect to the husband. He was not to be charged with the child, if he was physically incompetent, or if he was beyond sea during the whole period of gestation; then if he was beyond sea at the time of conception, 8 East, 193; then if he was living at such a distance from his wife as to make all intercourse improbable; and at last, if he was living separate from her under such circumstances of distance or alienation, as rendered intercourse improbable. At last then, the right of the husband is fully admitted, as an element in the question of legitimacy; and the definition of a legitimate child now stands: *one whose parents were intermarried before it was born*. And this change in the definition is here and there recognized in our law books. Salk. 484; 8 East, 204, 211; Shelf. on Mar. and Div. 706-7; 2 Stephen's Com. 314.

But the old definition still stands in almost all our modern law books, and it was followed to the letter, and perhaps in its original spirit, when it was decided that the husband was chargeable with an ante-nuptial generation, whether his or not, because its mother was his wife when it was born.

The pernicious influence of the old exploded rules is further seen in the idea very commonly attached to the maxim: *pater est quem nuptiæ demonstrant*, which is often used as if it meant the nuptials demonstrate the paternity; yet this is right in the face of that other maxim: *qui ex damnato coitu nascuntur, inter liberos non computantur*. Certainly it was formerly read as being equivalent to *partus sequitur ventrem*; but so soon as the husband's rights began to be regarded, it began to obtain its true meaning, and in modern days all learned men treat it as equivalent to *pater a nuptiis præsumitur*. I say this is its true meaning, and always was. Bracton treats it as a mere presumption, and says that it stands until the contrary is proved. It is derived from the Roman law, and no one will pretend that, there, it had any other meaning; and the canonists used it in the same sense. And here I may add, that all the true and valuable principles of our old law on this subject, were derived by our old writers from the Roman Pandects, and all the more modern principles are there likewise.

I may add also that not one of the exploded principles of our jurisprudence ever existed in the Pandects, and I do not find that any of them ever existed in any part of Europe where the Roman law was adopted.

The presumptive character of the maxim, *pater est*, &c., is presented in the Roman law with direct bearing on this case, for there it is held that a child, born within six months after the marriage, or over forty weeks after its dissolution, is presumed to be illegitimate until the contrary is proved. This is founded purely on physiological principles or natural laws, and Hippocrates is appealed to for them. And it was on these principles that the case of *Alsop vs. Bowtrell*, Cro. Jac. 541 was tried; for there the birth was forty weeks and nine days after the husband's sudden death, and, on the evidence of matrons and physicians, the child was declared legitimate. This is the rule also in France and Germany.

This child was begotten before and born after marriage, and we have no other evidence of the paternity than the marriage. Is this evidence by itself of that fact? It has been shown that the old definition fixes the paternity by the nuptials, without regard to truth or evidence. Thien there are cases and dicta which assume that there ought to be evidence, and which assert the principle, that where the condition of the woman is known, it is adopted by the act of marriage, (8 East, 208, 210, 212; 2 Brockenb. 269; 2 Munf. 442, 3 ib. 602; 13 Iredell, 502) but these are possibly only some of the dregs of the old rule, and there are no English or Pennsylvania cases since the abandonment of the old absurdities, that affirm the question. It is therefore open for discussion and decision, on pure rational principles.

We must take the question in its simplest form: is marriage evidence of the paternity in a case of ante-nuptial generation? for thus the case is presented to us. Being begotten before marriage, certainly, until the marriage, there is no presumption of the paternity of the yet unborn child. As a fact, the marriage does not account for anything existing before it; but if we knew the paternity, we might account for the marriage. Out of a thousand neighbors, the law, until the marriage, could fasten its suspicion or

presumption upon none. It therefore presumed the innocence of every man, and pronounced its *prima facie* sentence that Samuel Page was not the father. And, as our question excludes his knowledge of the woman's condition, of course it forbids us from treating the marriage as his admission of any share in producing that condition. If the mother had sworn the child to the true father, and then married another man before the birth, I suppose the marriage would not have been evidence that her prior oath was perjurious; yet if it proves one paternity and the marriage another, there is a flat contradiction.

If, notwithstanding all this, we still declare that the marriage proves the ante-nuptial paternity, we disregard the natural laws on which presumptions are founded, and raise mere arbitrary and fictitious ones, that do not profess to declare the truth; but only to declare that, under given circumstances, the relation of parent and child shall be taken to exist, though all natural presumptions say that it does not in fact exist. If this is not judicial legislation, then I do not understand the term. If marriage fixes the paternity of an unborn child, because the husband is presumed to admit it, much more ought it to fix the paternity of a whole brood of bastards, already born and living with their mother at the time of their marriage; but nobody would venture to say this. The canon law did not presume the paternity in such a case, though it legitimated the children, if the paternity was admitted or proved to be in conformity with the subsequent nuptials.

The presumption of the paternity from the nuptials alone, is a falling back upon the very principles of the old, absurd and abandoned decisions; and we might as well say that gestation might be complete in three months or three weeks; for, when we abandon natural presumptions and go to fictions, we are simply disregarding truth; and then the more plainly false they are, the less liable are they to mislead, by being supposed to be intended for truth. Such a fiction would have the generous merit of presuming an unnaturally prompt gestation, rather than impute incontinence to the woman.

We add a new element to the question, when we assume that the

husband knew the wife's condition when he married her. But a marriage, even under such circumstances, has no direct tendency to prove paternity. Indirectly it does tend to prove it; for marriage with such knowledge, suggests at once to the mind, man's instinctive aversion to female infidelity, and, by the aid of this additional element, forces him to believe, if nothing appears to the contrary, that the marriage is an acknowledgment of paternity. But such a conclusion is plainly one of fact and not of law, and can be drawn only by the jury and not by the court.

As, however, these elements do not belong to our case, and we cannot presume, from the nuptials themselves, that they accord with the parentage, we must necessarily look for facts, arising after the marriage, that may cast light upon the question. And certainly we should have some natural and rational grounds of deciding it, if we found that, after the child's birth, the husband treated it as his own; or if we do not discover any of those facts which would ordinarily be expected to arise on the development of a spurious progeny. Strip the case of these, and let it appear, as it does here, that the husband embraced the first decent opportunity of disowning the child; that his paternity was then denied by both him and his wife; that the child was sent away from his house, and reared, as illegitimate, by its maternal grandfather; and then we have nothing left but the marriage, as a ground for the presumption of paternity; and that has already been shown to be insufficient, even when there are no facts pointing to a contrary presumption.

These conclusions do not depend, for their proof, entirely upon deductions drawn from the principles of human nature. If they did, I would mistrust them. They have a very large experience in their favor. In Scotland and on the continent of Europe, the paternity of a child, begotten before marriage, is not presumed from the nuptials alone; but from the nuptials and other circumstances preceding and following them. The Roman law presumes bastardy, if a child be born within six months after marriage, until the contrary is shown; because a child of less than six months gestation is not usually born alive; and this law has undergone a

European experience of more than a thousand years without alteration or dispute; while our old arbitrary judicial rule could never be steadily administered, because of its disregard of justice, and has at last been given up in all cases, if it is not still retained as the rule of ante-nuptial generations.

I have already said, that, as a general test of paternity, it never reigned with an unfaltering sway, and that now its arbitrary character is abandoned, and it is admitted, in the true sense of *pater est quem nuptiæ demonstrant*, as the expression of a presumption, deriving its measure and authority from pure principles of natural law. An ante-nuptial case is given in the Year Book, 44 Ed. 3, 12 b., wherein evidence was admitted that another than the husband was the father of the child, without any other ground laid for it except that the husband was confined to his bed by sickness from the time of his marriage until his death. *Foxcroft's case*, as understood by Lord Ellenborough, 8 East, 200, 205, is even stronger than this, and goes the whole length of the principles I am contending for; for therein a birth, twelve weeks after marriage, was condemned on the ground that the husband was an infirm, bed-ridden man when he was married. Lord Ellenborough's explanation of the case may be erroneous; but still it is valuable as indicating his opinion of the law.

But why do we presume legitimacy in any case? Mathew says the presumption "rests simply on the supposition of the virtuous conduct of the mother; a branch of that equitable rule that assumes the innocence of a party until proof be brought of actual guilt." Pres. Evid. 22: 7 Humph. 410. If this is a correct grounding of the rule, then, of course, there can be no presumption of legitimacy, arising out of marriage merely, in such a case as this; for the birth proves that the wife was not innocent. But the rule operates positively the other way, and presumes bastardy; because it presumes the innocence of him who became the husband. From his lawful act of marriage, there can be no legal presumption of any prior unlawful act committed by him.

The leaning in favor of innocence is carried so far as to presume-

the death of a former husband, if he was not heard of for a year before his wife's second marriage. 2 B. & Ald. 386: 4 Cush. 49. And in a case of divorce *a mensa et thoro*, though the parties remain husband and wife still, being separated only "until they shall be reconciled to each other," and intercourse is not unlawful; yet a child begotten during the separation, is presumed a bastard, because the husband is presumed to have obeyed the law of the separation. Salk. 123. *A fortiori* then, is the presumption valid that an antenuptial conception does not proceed from the husband, because such a presumption involves a charge of guilt. Even opportunity proved is not a ground for such a presumption.

Let us take the old definition of a legitimate child: born in marriage, or in a competent time after; either will answer. But suppose a birth falls within both categories; within a competent time after the death of a former husband, and after marriage with another. Mr. Justice Bereford rescued the case from its dilemma quite logically, by saying that the child might choose which should be its father: and he has been quoted ever since, though no case of paternity seems to have ever been decided in that way; and Brooke rejects the saying, when transmitting it to us, "*quod non est lex, ut videtur.*"

But why was it logical? Simply because it was a legitimate issue of false premises, or of an arbitrary rule that disregarded the truth. The old rule admitted a portion of truth, when it admitted the competent time after the termination of the marriage, as an element in the question of legitimacy; but it rejected the correlative portion, when it refused to consider the competent time after the commencement of the marriage relation.

But the time being ascertained, here are two conclusive and contradictory presumptions of law, giving to the child two fathers. Yet nature rejects this result: how shall we avoid it? By Bereford's rule. If we will not hear the truth, we must have an arbitrary and complete substitute for it. We wonder that, in assigning an umpire for this dilemma, he did not think of one who knew more about the case. But Bereford's rule was too absurd, and nature

broke over it; and it always does in the end, break over the strongest fortifications of error; for it always speaks the truth and demands it.

Naturam expellas furca: tamen usque recurret,
Et mala perrumpet furtim fastidia victrix.

Nature demands an inquiry into the very truth, in the case of too early, as well as of posthumous births, and a decision according to natural presumptions and probabilities. And so, in *Thecar's case*, (Litt. R. 177; Co. Litt. 123 b. *note*,) it was after a trial by jury on the facts that the child was declared Thecar's son; the first and not the second husband's.

But this claimant never was acknowledged nor reputed to be the daughter of Samuel Page: is this a proper element to aid in testing the legitimacy of a child ante-nuptially begotten?

It was substantially such evidence that was allowed to prevail in cases where the wife was living separate from her husband and in adultery. 5 Clarke & F. 163; 4 T. R. 256 356; 20 Alab. 548. And Lord Mansfield says, Cowp. 594: "suppose from the hour of a child's birth to the death of its parent it has always been treated as illegitimate; that would be good evidence." And Fleta, 1. 15. 4, and Bracton, 2. 29. 5, attribute the same value to the act of disowning and sending away a child from the house. And surely it must be so, when reputation is sufficient evidence of parentage, even when the parents are living. 4 Bing. 266.

Such repudiation of a child seems to me very strong evidence of bastardy, regarding it according to the ordinary manifestations of human feeling; for no man, who believes himself to be the father, could thus ruthlessly and perseveringly sever the ties of blood, and no mother could submit to such a severance, and to the abiding indignity involved in it, unless it was just. If the charge were untrue, she would leave her unworthy husband and cleave unto her child. I think the evidence ought to have been admitted.

But we have still another question to dispose of. Is the mother a competent witness to prove that a child, begotten before marriage and born after it, is not her husband's?

I know that it has been said that public policy excludes the mother in bastardy and pauper cases, from being a witness to bastardize her children, by proving the non-access of her husband. 11 East, 182; 6 Bin. 291; 5 Ad. & E. 180. But what idea is this term, public policy, intended to express? I understand it as a general term, expressive of the principles upon which certain persons are excluded as witnesses. If this is not so, then it is to me an undefined and transcendental term, and I cannot consent to use it as a screen for my ignorance. That is a bungling analysis that ends in undefined results, and I cannot admit that this term, public policy, is a mere receptacle of the sediment of the analytic process. I receive it as a term expressive of all the reasons which the law admits as available against the competency of evidence or witnesses, if we allow it to go beyond those reasons that reject evidence that is violative of confidential relations. It never excludes relevant truth on account of its indecency; else it might at once declare that no causes should be tried that involve questions of immorality.

I admit that in bastardy and pauper cases, when the mother is a married woman, she is not competent, without a *prima facie* case having been first made out, that she has had no intercourse with her husband that would account for the birth. I say a *prima facie* case, because that is all that is made out by proof that the husband and wife were living apart in the same country, and within visiting distance, which was the proved non-access of many of the cases. 6 Binney, 288; Stra. 51; 1 Queen's B. R. 444; 1 Brown's R. (Appendix) 47. How does this make her competent? Because it will justify the jury in finding that the husband is not the father, and therefore is not interested. Some cases say that she must not be the *only* witness of non-access (1 Wils. 340; 8 East, 202, 211; Hardw. Cas. 77; 6 Binney, 288, 291); and this involves the same idea. If her husband's interest is apparently removed, she may testify to the paternity,—which she could not do without adding expressly or impliedly that she had had no intercourse with her husband about the time of the conception.

I know that Lord Mansfield is reported, Cowp. 594, as having said that "it is a rule, founded in decency, morality and policy, that

they (husband and wife) shall not be permitted to say after marriage *that* they have had no connection, and therefore that the offspring is spurious." But he was speaking of post-nuptial intercourse, and the word *that* is misplaced. He might truly say so in that sense, and not in relation to ante-nuptial intercourse: for surely it is eminently moral and decent to deny criminal connection, and for either to acquit the other of it; and if they were charged with it, the law would, in an action of slander, presume it untrue. And when the wife is rendered competent by the apparent non-access of her husband, no ideas of decency are allowed to exclude her from testifying to her own adulterous connection with a stranger.

To suppose that it is a regard for decency that excludes so close an investigation of the truth, is to overlook the whole spirit of our legislation and jurisprudence on this subject. To allow the few dollars that are involved in a bastardy case to be a sufficient reason for demanding the truth, even from the mother; and yet to shut it out in inheritance cases, which usually involve much greater amounts, and which, by the very reason of moral refinement, have a most intense moral interest, would be taking a very low and materialistic view of the demands of justice in such cases. To refuse, on grounds of decency, to allow the wife to testify of her husband's absence, and yet to compel her to testify that she has had criminal intercourse with another man, is surely very absurd. To say that necessity demands the testimony of the wife when the State wants to know who shall support a bastard; and that it is otherwise when the State wants to know how to divide an inheritance, is surely to talk without thinking. And to suppose that the mother is not admitted until the child's bastardy has been otherwise proved, is to overlook some things already said, and also the fact that cohabitation and reputation are *prima facie* evidence of marriage and of consequent legitimacy; and yet, in inheritance and pauper cases, the parents are competent to disprove the apparent marriage, and thus to show illegitimacy. Cowp. 591; 2 Phil. Ev. 287; 3 Pick. 298.

Lord Kenyon says, 6 T. R. 331, "if the parents may be called to prove that the children are legitimate, there is no reason why they

should be considered incompetent to prove that they are illegitimate." Other cases show, that the mother may be a witness as to the legitimacy of her children. 2 Stra. 925. Hardw. Cases, 74. And when to all this we add, what we find in all the books of evidence, that reputation of marriage and parentage, of legitimacy and illegitimacy; the declarations of parents about their children; their treatment of them, and their family records, are evidence of inheritance; how can we, with any systematic consistency, say that the parents are incompetent witnesses of these facts?

Legal evidence is the means of arriving at truth in juridical controversies, and it depends so completely upon natural principles, and it is naturally so much modified by the constant changes and developments of the social life, that no people, I believe, has ever attempted to reduce its rules into a system of positive law. It is only when courts have set up bad ones as positive law, that the legislative power has been compelled to interfere and institute others more natural. In this case, it seems to me, we are converting an unnatural rule of evidence into a rule of positive law; for we are rejecting a witness that naturally knows best the fact under investigation, and evidence that would tend to demonstrate it. This is imposing a dead and arbitrary law, where we ought to have a living and natural one. It seems like an effort to give new life to the fossil ideas of a wornout age. It is refusing to the law its proper character of being the expression of a living sympathy between the government and the people. Rightly expressing this sympathy, the law is right; otherwise it is not; "one touch of nature makes the whole world kin."

I have a very strong belief that the evidence offered in this case is of the very kind that is naturally the most convincing, and I think that its value would be properly tested by submitting it to a jury. I do not believe that any jury would hesitate upon it to pronounce this claimant a bastard; and the more pure and intelligent the jury, the more certain would be this result.

I have now performed my duty in relation to this case; I have done it sincerely, earnestly and carefully; but my brethren have come to a different result. And I am sure that they have con-

sidered it as earnestly, and carefully and sincerely as I have done. I most sincerely hope that they are right; for, if they are, they have declared the very justice of this case, and have saved us from conclusions that might operate very unjustly in time to come. I cannot see as they do, and yet I freely admit, that with their opinions against me, the probabilities must be that I am wrong. I would reverse the judgment on both points.

Judgment affirmed.

*In the Court of Common Pleas of the Twelfth Judicial District
of Pennsylvania.*

IN THE MATTER OF DAVID MUMMA'S ACCOUNT.

An attorney at law, guardian of minors, can lawfully charge his wards for professional services, in conducting litigation for their benefit.

The opinion of the court was delivered by

This case came before the court, on the report of an auditor appointed to pass on the account of David Mumma, Esq., guardian of the minor children of William Gotshall, deceased.

The report showed that the accountant had commenced and conducted to successful termination, an action for the recovery of damages for injury done by the Harrisburg and Lancaster Railroad to the estate of the wards. The amount paid by the guardian to assistant counsel was allowed by the auditor, but the sum of one hundred dollars claimed for his own professional services was disallowed.

Exception was taken to the report, and after argument, the following opinion was delivered by

PEARSON, P. J.—The report of an auditor presents a single question, “can a guardian, who is an attorney-at-law, charge his ward for professional services rendered?” The auditor came to the conclusion that he could not, and struck the item from the account.

The beneficial character of the service is conceded, but it is said to be against legal policy to sustain the charge, and that it is contrary to settled principles of jurisprudence. In Pennsylvania we have no decision upon the subject of which I am aware, and the auditor, therefore, adopting the English rule, has shown by a clear, lucid and logical argument, that from the law as there established, the claim must be disallowed.

In England it is clearly settled that a trustee is never entitled to compensation, however arduous the duties of the trust, except where there is an express provision found in the instrument creating it, and this rule is applicable to every class of trusts, including executors, administrators and guardians.

The doctrine is the same in New York, except where it has been altered by statute. See 1 Johns. Rep. 27; *Idem*, 527; *In re Bank of Niagara*, 6 Paige, 213.

In Pennsylvania, on the other hand, the rule is clearly otherwise, and compensation is allowed in any case, except where the trustee has undertaken to perform the duties gratuitously.

At the time of the American revolution, there was no decision in England showing that an attorney-at-law, being a trustee, could not recover for services rendered to the trust estate as an attorney, and consequently, as the decisions *since* are not obligatory, there is no rule binding on us. Had the subject come before their courts at an antecedent period, I have no doubt that the point would have been settled as now established. The courts both of law and equity have long since declared that a trustee could recover no compensation, nor is anything allowed to a barrister without an express contract, and probably not to an attorney, beyond his legal fees. But every State has a right to establish such a system of jurisprudence as best suits the circumstances of the people, and accords with the interest of the majority, and in Pennsylvania, from the first settlement of the province, trustees of every character have been entitled to compensation, and attorneys-at-law can recover on a *quantum meruit*. The objection to this claim most relied on under the English law, has, therefore, no application in this State.

It is said to be contrary to public policy to allow any remuneration for professional services to an attorney, when acting in a fiduciary capacity, as thereby he might be tempted to involve the estate in improper litigation. His duty might clash with his interest, and the latter preponderate. Such appears to be the reasoning of Lord Lyndhurst, as given by Williams, in his treatise on Executors, 1680, and all compensation to the attorney was refused. See 2 Dow and Clark, 51.

In *Christophus* against *White*, 10 Beavan, 523, the court went even further, and refused it to the partner of the trustee, as by allowing it the latter would indirectly obtain compensation, which is against public policy. It is there said, however, that had another attorney been employed, it would have been allowable. In the matter of the *Bank of Niagara*, 6 Paige, 213, the same course of reasoning is adopted by the chancellor of New York, and nothing was allowed to the attorney-trustee but his legally taxable costs. "As a trustee he must perform his duty without compensation, and as an attorney can recover nothing for services without a contract, and cannot bargain with himself." It is also stated that there would be great danger in suffering a trustee to employ counsel when he is himself to be employed. On the contrary we have a decision of the Supreme Court of Alabama, in *Harris vs. Martin*, 9 Ala. R. 895, in which the whole subject is fully and ably examined, and compensation allowed an attorney-administrator, for attending to suits brought and carried on *bona fide*.

The court declare, that for advice, or other small acts done in the performance of the trust, he cannot be compensated, but for litigation of importance to the estate, publicly conducted, there can be no difficulty in the court determining the propriety of the proceeding and amount of remuneration, and an allowance should be made equal to that ordinarily given to counsel of equal standing for similar services, the court to judge of the necessity.

The difference is clearly pointed out between the rule in England and Alabama, both as to compensation to trustees and attorneys, and it is said that there is no reason why an attorney should not be allowed for his services when necessary, and *bona fide* rendered, and

the inquiry should be, "what would a prudent man, vested with the functions of an administrator, feel authorized to pay an attorney under all the circumstances?"

This decision, in all its bearings, is better adapted to our system of jurisprudence than the rule adopted in England and New York, and I am disposed to follow it.

For one humble member of the legal profession I never can consent to establish a rule by which it is implied that every lawyer is dishonest, and will encourage litigation for the mere purpose of putting money in his own pocket. By a parity of reasoning we must say, that if the guardian chanced to be a physician, he could not charge for professional services rendered to his ward in case of sickness, because he had an interest in creating an imaginary disease so as to render the services; or if the sickness were real, in making more visits than the nature of the case required. Should he be a tailor, shoemaker, or hatter, the bills for articles furnished the minor in his line should be rejected, because the interest of the mechanic would lead him to furnish too great an amount of the particular kind of clothing to the ward, thereby clashing with his duty.

The court can as well determine as to the necessity and propriety of litigation, as it can of the mechanics' bills, and infinitely better than of the service of the physician.

We feel ourselves fully authorized, on every sound legal principle in force in Pennsylvania, to allow a fair and reasonable compensation for professional services rendered by a trustee, the court always being the judge as to the propriety, necessity, and value of the services. Nor do we believe that such a rule will endanger the interest of the *cestui que trust*, but on the contrary, will tend to promote it.

By the practice of the English and New York courts, the trustee is tempted to give himself as little trouble as possible in relation to the trust estate. He may know of valid claims, yet fail to pursue them, as thereby his labor is increased without adding to his compensation. A vigilant, active, intelligent lawyer, acting in a fiduciary capacity, may be able to ferret out and recover property of value to those whom he represents, and in our opinion the interests of society are promoted by encouraging him in so doing. We can-

not believe that by so deciding we clash with any rule of law or public policy.

In England and New York, an attorney administrator is justifiable in engaging another attorney to attend to the interest of the estate, and if such an attorney happen to be an executor or guardian, he may in turn employ his employer in relation to *his* trust. Why not permit each to attend to the business of the estate, which he best understands, and not drive the two to an exchange of labor?

The litigation, for attending to which the present compensation is claimed, came under the immediate observation of this court. We can, therefore, judge of its propriety, and the extent of the services. The guardian through his knowledge as an attorney, and by his vigilance in the pursuit of his profession, saved the whole amount recovered from the railroad company, for his wards, and is, in our opinion well entitled to the compensation demanded.

If we had not the power to allow it in this form, we should in another, by increasing the sum given by the auditor to cover expenses, and as compensation for his labor as guardian. We prefer, however, to meet and decide the main question of the case, it being of great importance to the legal profession in this commonwealth, as they, more than any other class of men, are called upon to act in a fiduciary capacity.

It is ordered that the report of the auditor be reversed on the exception filed. That the account as originally filed be confirmed, and the costs of the audit paid out of the fund in the hands of the guardian to be equally deducted from the share of each ward.

In the Supreme Court of Tennessee, September Term, 1856.

MARCUS C. PARKER vs. REBECCA MEEK, SR.¹

1. The parent, as such, has no direct remedy at common law for the seduction of a daughter. He has to resort therefor to what has been denominated, "but little

¹ We are indebted to the learned State Reporter, John L. T. Sneed, Esq., for the early sheets of this 3d Vol.

more than matter of fiction"—the relation of master and servant assumed to exist between parent and child—in order to redress this wrong. Two distinct actions, it is true, are submitted to his option, but both have relation to this hypothesis of loss of service, upon which they are dependent—in the one case, as matter in the aggravation of damages; and, in the other, as the very gist of the action itself.

2. In the action of trespass *vi et armis* for debauching a daughter, the *gravamen* is the illegal entry of the seducer upon the parent's premises; and the seduction itself, and consequent loss of service, may be averred and proven in aggravation of damages. In an action *on the case* for the same injury, the *gravamen* is the consequential injuries arising from the seduction, in loss of service to the parent. In the first action, it is essential that the daughter, whether of full age or not, should have been upon the parent's premises at the time of the seduction; in the latter, whatever be the age of the daughter, it is immaterial when the wrong was perpetrated, so that she reside with the parent some portion of the time of her pregnancy, or of her lying-in.
3. In actions for seduction, proof of menial services by the daughter to the parent is not necessary. Evidence of the most trifling and valueless acts of service is sufficient. Indeed, it seems, that the fact that the daughter lived with the parent for a time during the period of pregnancy and parturition, is of itself sufficient to raise a presumption of service. This, however, may be rebutted by proof that she lived with the parent as boarder, or in some other relation than that of mere child or servant.
4. If the daughter lived with the mother before and at the time the child was born, performing service for her, the mother had a legal right to maintain an action of case for the seduction, although the father, who had died before the birth of the child, was living at the time of the seduction.

This was an action on the case, instituted in the Circuit Court of Knox county, in May, 1852, by Rebecca Meek, Sr., against Marcus C. Parker, for debauching Rebecca Meek, Jr., the daughter of the plaintiff. The seduction occurred on the 10th of August, 1851, at the house of her father, and the said Rebecca, Jr., was delivered of a child in April, 1852. The father of Rebecca, Jr., died on the 14th of October, 1851, and she being then in the twenty-fourth year of her age, continued to reside with her mother, the plaintiff, until the delivery of the child. At the June term, 1853, before Alexander, Judge, there was a verdict for the plaintiff, assessing her damages at \$2,500 and judgment thereon, from which the defendant appealed in error to this court. This cause was heard at

the September term, 1853, and was continued upon advisement until the present term, when the opinion was delivered.

W. H. Sneed, Lyon and Temple, for the plaintiff in error.

Rodgers and Boyd, for the defendant in error.

The opinion of the court was delivered by

MCKINNEY, J.—This was an action on the case, brought in the Circuit Court of Knox, for the seduction of Rebecca Meek, Jr., the daughter of the plaintiff. The daughter was examined as a witness. She testified that when seduced—which was on the 10th of August, 1851—she was twenty-four years of age; that, at the time of her seduction she was a member of her father's family and living in his house; that her father died on the 14th of October, 1851, little more than two months after she was seduced; that during the life of her father, she performed services for him, and after his death, she continued to live with her mother, and to perform services for her, up to the time of the birth of her child, which took place on the 24th of April, 1852, and has since resided with her.

Upon the foregoing facts it was insisted, on the trial, by the defendant's counsel, that the mother could not maintain this action, the seduction being in the lifetime of the father, with whom the daughter lived at the time she was seduced. But the court instructed the jury, "That if the daughter was living with her mother, before and at the time the child was born, performing service for her, that the mother had a legal right to maintain the suit, notwithstanding the father may have been alive when the act of seduction took place." The jury found for the plaintiff, and assessed the damages at \$2,500. The court refused a new trial, and the defendant appealed in error.

The question is—did the court err in this instruction?

The remedy afforded by the common law to a parent for the seduction of a daughter, when followed by pregnancy, is founded, not upon the relation of parent and child, but upon that of master and servant. The action, in most cases, may be either *trespass* or *case*; and the distinction between the two actions, as respects the ground of recovery, is important to be kept in view. Where there has

been an illegal entry into the father's house or premises, by the seducer, an action of trespass, *vi et armis*, may be maintained, for the breaking of the house, or trespass on the premises, and the seduction of the daughter, and consequential loss of service, may be alleged and proved as an aggravation of the damages: Or an action on the case may be supported, founded merely on the consequences of the seduction.

In the former action, in which the illegal entry of the father's house is the technical ground of the action, and the seduction and loss of service is considered as only matter in aggravation of the trespass, it may well enough be maintained, consistently with the nature of the action and the principles by which it is governed, that it cannot be supported unless the daughter were living with the plaintiff at the time of the injury. But, in an action on the case, the ground of which is, the consequential injury resulting from the seduction, it is unimportant whether or not the person seduced lived with the plaintiff at the time the seduction took place. It is admitted that this conclusion is directly opposed by the case of *Dean vs. Peel*, 5 East, 45, and other cases, both English and American, cited in the brief for the plaintiff in error; but we think it is fully supported by reason and weight of authority.

When it is said that this remedy is founded on the relation of master and servant, and that therefore, the *gist* of the action is the loss of service; it must be borne in mind that such relation, as has been well observed, is "little more than matter of *fiction*, made use of to support the action." 3 Stark. on Ev. 1307. By the common law, a parent cannot, in that character merely, support an action for debauching his daughter. The action is maintainable only in respect of the supposed loss of service. Bl. Com. vol. 3, 142, n. 14. 2 Saund. on Pl. & Ev. 350. This idea of the loss of service to the master, is said to be a necessary fiction of law, in order that the person seduced may be a competent witness; as otherwise the wrong-doer might escape for want of proof; the injury, from its nature, being susceptible of proof only through the parties to it. See Reeve's Domestic Relations, 298, n. 1. And it is to be observed, that the authorities which adhere most rigidly to the doc-

trine, that the loss of service is the foundation of this remedy, admit at the same time, that the most trifling and valueless acts of service are sufficient; and that the mere loss of menial service is not the real ground of the action. But, notwithstanding the doctrine maintained by the older authorities upon this subject, it is now well settled by numerous cases, both English and American, and upon more just and enlightened views of the domestic relations, that proof of actual service by the daughter is not necessary to support this action. See *Hewett vs. Prime*, 21 Wend. 79, and cases there cited. If the daughter lives in her father's family, service will be presumed. It is immaterial whether she be a minor or of full age, if she live with her father. If under age, she is, of course, his servant. But, though this is not the case, if she be of full age, yet from the fact that she lives with her father, the presumption is that she is his servant, unless such presumption be removed by proof that she lives with him otherwise than as a servant. Reeve's Domestic Relations, 292.

The case of *Dean vs. Peel* is denied to be law by several American cases. And it is well settled, that if the daughter be a minor, it is not material that she should be living in her father's family at the time of her seduction, to entitle him to maintain an action on the case against her seducer. In *Martin vs. Payne*, 9 Johns. Rep. 387, a daughter of the age of 19, went to live with an uncle, with her father's consent. The uncle agreed to pay her for her work, but there was no agreement for any definite time. While there she was seduced, and immediately afterwards returned to the house of her father, who maintained her, and paid the expenses of her lying-in; though, until her seduction, she had no intention of returning to her father. And it was held that the father might maintain an action on the case against her seducer; the father not having divested himself of the legal right to reclaim the services of his daughter; the relation of master and servant was presumed from his right to command her services. In the case of *Sargent vs. —*, 5 Cowen's Rep. 106, a widow bound her minor daughter, by indenture, as a servant till the age of 18. During the period of her service she was seduced. When her pregnancy was disco-

vered, the indentures were canceled by consent, and the daughter returned to live with her mother, and while in her service, was delivered of a child. It was held that an action on the case might be maintained by the mother against the seducer. The court say, that from the time of the return of the daughter to her mother's house, at least, the relation of mistress and servant was restored between them; and that when the action is *case*, it is not material who was entitled to the services of the daughter at the time of the seduction; the real inquiry is, on whom has the consequential injury fallen? It cannot be necessary, says the court, according to the theory or just principles by which this action is regulated, that the parent, in order to sustain it, should be entitled to the services of the daughter at the very instant when the act is committed which subsequently results in a loss of service, or necessary pecuniary disbursement.

In *Clarke vs. Fitch*, 2 Wend. Rep. 457, the daughter being a minor, left her father's house, by his permission, to work for and maintain herself. She was seduced and gave birth to a child. From before her seduction until after the birth of her child, she had never been in her father's house. But the person by whom the expenses of her lying-in had been paid, looked to her father for reimbursement. And on the ground of this liability, it was held that the father might maintain an action on the case for seduction. Because the father had a right to recall his daughter and control her services; and the loss fell upon him of the expenses of her confinement and sickness. So in *Hornketh vs. Barr*, 8 Serg. & R. 36, the same doctrine was held; and it is maintained by several other cases referred to in the argument. In these cases, the minor daughter is regarded as *de jure* the servant of the father, though *de facto* the servant of another at the time; on the principle, that the daughter, though not living with her father at the time of the injury, was still subject to his control, and he had the legal right to command her services; and hence the supposed relation of master and servant was presumed to exist.

The fictitious relationship of master and servant does not, however, exist where the person seduced was of full age at the time of

the injury. In the latter case the daughter is not, in law, the servant of her parent; nor is he liable for her maintainance, or the expenses of her confinement. Hence, to entitle the parent to maintain an action for debauching a daughter above the age of twenty-one, it must, at least, appear, that during some portion of the time of her pregnancy, or of her lying-in, she was a member of his family. From the fact of her living with her parent, service will be presumed, as has been already shown. But, where the action is *case*, it is no more necessary in the case of a daughter of full age, than in that of a minor, that she should have been living in the family of the parent at the time of the seduction; nor is it any more important in the one than in the other, who was entitled to, or enjoying her services at the time of the injury. The only inquiry of importance in either case, is, on whom has the consequential injury fallen? And such person, whether father, mother, or other person standing *in loco parentis*, is entitled to legal redress in the present form of action.

When the action is trespass *vi et armis*, it is admitted the law is otherwise. In the latter action, the breaking the house, or illegal entry upon the premises, being the legal ground of the action; and the consequential injuries but matter of aggravation; and a justification of the entry into the house, or upon the premises, in such case, being a sufficient justification of the whole charge in the declaration; it is clear, that if the person seduced were not living in the house of her parent, or in his actual service at the time of the seduction, this action could not be supported. In such case, the idea of a trespass against the parent is necessarily excluded, and the ground of action wholly fails. But in an action on the *case*, the illegal entry of the parent's house is not an element of the legal ground of action; neither is the mere act of seduction; the gist of the action is the consequential damages resulting from the seduction. It cannot, therefore, upon principle, be at all important whether the parent was, or was not, entitled to the daughter's services at the time of her seduction. In this view of the law, we dissent from the conclusion maintained in the cases of *Logan vs. Murray*, 6 Serg. & Rawle, 175; *Nicholson vs. Stryker*, 10 Johns. 117;

Miller vs. Thompson, 1 Wendell's Rep. 447, and the numerous other cases, English and American, relied upon by the counsel for the plaintiff in error; and hold, that the present action may be maintained by the mother, although by reason of the fact, that the father was living at the time of the seduction, and the seduced was at the time a member of his family, and rendering service to him, the mother was not then, nor could she be, in law, entitled to the services of the daughter: but the latter having remained with the mother, after the father's death, in the presumed relation of servant, and the trouble and expenses of lying-in having fallen upon her, the action is maintainable on this ground.

Judgment affirmed.

RECENT ENGLISH DECISION.

*In the Court of Exchequer.—Sittings in banc after Hilary Term,
February 21, 1857.*

DEGG, ADMINISTRATRIX vs. THE MIDLAND RAILWAY COMPANY.¹

A person who came voluntarily to assist the servants of a railway company, doing some work on the railway, was accidentally killed by the negligence of some other servants of the company. The railway company not having authorized the negligence, and the servants being persons of ordinary skill and care for the work,—Held,

First, that no action lay against the company by the personal representative of the deceased under the 9 & 10 Vict. c. 93;² and,

Secondly, that the above facts constituted a defence under the plea of not guilty.

This was an action brought under the 9 and 10 Vict. c. 93, by the administratrix of one Degg, to recover damages for the death of the deceased. The declaration alleged that the defendants were possessed of a certain railway, and engines and carriages upon it, and by their servants were at work on the railway with those carriages and engines, and carelessly, negligently and improperly moved and propelled certain trucks against other trucks, without due notice or

¹ 21 Jur. 395.

² This statute has been substantially re-enacted in many of the States. See 1 Tidd's Pract. 9 note, Am. edition.—*Eds. Am. L. Reg.*

precaution, in consequence whereof, and of the carelessness, negligence and unskillfulness of the defendants by their servants, the deceased was killed, &c. To this declaration the defendants pleaded first, not guilty; and secondly, a special plea, to the effect that at the time of the accident the deceased was voluntarily assisting some of the servants of the defendants in their work on the railway; that the servants of the defendants were persons of ordinary skill and care for the work on which they were employed; and that the act in question was done and the injury inflicted without the authority of the defendants. To this plea the plaintiff demurred; and issue having been joined on both pleas, the cause was tried before Alderson, B., when it appeared that the deceased met his death in the manner stated in the pleadings; namely, some servants of the defendants being engaged in moving trucks along the railway, the deceased volunteered to assist them, and in so doing was accidentally killed by a truck which had been set in motion by some other servants of the defendants. On this evidence the judge told the jury that the defendants were bound to appoint persons of ordinary skill and care to work on their railway, and if the servants whose conduct caused the accident were not such, their verdict ought to be for the plaintiff. If, however, those servants were persons of ordinary skill and care, although they might have been guilty of negligence in the particular act which caused the death of the deceased, the defendants would be entitled to their verdict. The jury found for the plaintiff on the general issue, and for the defendants on the special plea; the judge reserving leave to enter a verdict for the defendants on the first issue, if the court should on demurrer hold the special plea good, and that the finding on the issue raised by it necessarily amounted to a finding for the defendants on the general issue.

Keating, in Michaelmas Term, having obtained a rule accordingly, the demurrer and the rule were argued in the Michaelmas Term, (Nov. 22), and again in Hilary Term, (Jan. 14), before Pollock, C. B., Martin, Bramwell, and Watson, BB., by

Pigott, Serjt. for the plaintiff; and

Keating and *Phipson*, for the defendants.

The arguments fully appear in the judgment ; and the following authorities were referred to:—*Brock vs. Copeland*, 1 Esp. 203 ; *Ilott vs. Wilkes*, 3 B. & Al. 304 ; *Bird vs. Holbrook*, 4 Bing. 628 ; *Priestly vs. Fowler*, 3 M. & W. 1 ; *Davies vs. Mann*, 10 M. & W. 546 ; *Lynch vs. Nurdin*, 1 Q. B. 29 ; *Barnes vs. Ward*, 19 L. J., C. P. 195 ; *Rigby vs. Hewitt*, 5 Exch. 240 ; *Greenland vs. Chaplin*, Id. 243 ; *Hutchinson vs. The York, Newcastle and Berwick Railway Company*, Id. 343 ; *Wigmore vs. Jay*, Id. 354 ; *Wiggett vs. Fox*, 11 Exch. 832 ; *The Manchester Railway Company vs. Wallis*, 23 L. J., C. P. 85 ; *Lygo vs. Newbold*, Id. Ex. 108 ; *Tarrant vs. Webb*, 18 C. B. 797 ; *Southcote vs. Stanley*, 15 L. J. Ex. 339 ; *Paterson vs. Wallace*, 1 Macq. 748 ; and Reg. Gen., T. T., 1853, (Pleading,) r. 16.

Cur. adv. vult.

The judgment of the court was now delivered by

BRAMWELL, B.—In this case there were two questions for our determination—the first, whether the plea demurred to was good ; the second, whether the verdict found for the plaintiff on the general issue should stand, or be entered for the defendants. We reserved our judgment not from any doubt on the merits of the dispute between the parties, but from a difficulty as to the point of pleading raised by the second question.

The facts stated by the declaration and the plea demurred to may be thus summed up:—The defendants were possessed of a railway and carriages and engines ; their servants were at work on the railway in their service, with those carriages and engines ; the deceased voluntarily assisted some of them in their work ; others of the defendants' servants were negligent about their work, and by reason thereof the deceased was killed ; the defendants' servants were persons competent to do the work ; the defendants did not authorize the negligence.

We are of opinion that under these circumstances the action is not maintainable. The cases show that if the deceased had been a servant of the defendants, and injured under such circumstances as occurred here no action would be maintainable ; and it might be

enough for us to say that those cases govern this, for it seems impossible to suppose that the deceased, by volunteering his services can have any greater rights, or impose any greater duty on the defendants, than would have existed had he been a hired servant. But we were pressed by an expression, to be found in those cases, to the effect, that "a servant undertakes, as between him and the master to run all the ordinary risks of the service, including the negligence of a fellow servant:" *Wigget vs. Fox*, 11 Exch. 832, and it was said there was no such undertaking here. But in truth there is as much in the one case as in the other; the consideration may not be as obvious, but it is as competent for a man to agree, and as reasonable to hold that he does agree, that if allowed to assist in the work, though not paid, he will take care of himself, from the negligence of his fellow workman, as it would be if he were paid for his services.

But we were also told that there was and could be no agreement; that Degg was a wrongdoer, and therefore the action was maintainable. It certainly would be strange that the case should be better if he were a wrongdoer than if he had not been. We are of opinion that this argument cannot be supported. We desire not to be understood as laying down any general proposition, that a wrongdoer never can maintain an action. If a man commits a trespass to land, the occupier is not justified in shooting him; and probably if the occupier were sporting or firing at a mark on his land, and saw a trespasser, and fired carelessly and hurt him, an action would lie. Nor do we desire to give any opinion on the cases cited of *Bird vs. Holbrook*, 4 Bing. 628, and *Lynch vs. Nurdin*, 1 Q. B. 29; but it is obvious and a truism to say that a wrongdoer cannot, any more than one who is not a wrongdoer, maintain an action, unless he has a right to complain of the act causing the injury, and complain thereof against the person he has made defendant in the action. Now, it may be, that had the mischief here resulted from the personal act of the master, he knowing that the deceased was there, the master would have been liable; and that as the defendants' servants knew the deceased was on the railway, and because they knew that, were guilty of a wrong to him, they are liable to an action; but on

what reason or principle should the defendants be? If a servant is driving his master in a carriage, and a person gets up behind, and the servant knowing it, drives carelessly and injures that person, the servant may be liable, but why the master? The law, for reasons of supposed convenience more than on principle, makes a master liable in certain cases for the acts of his servants—not only in cases in the nature of contract, which depend on different considerations, but in cases independent of contract, such as negligent driving in the public streets, when damage is thereby done. This is the responsibility the law has put on them; there is a duty on them to take care that their servants do no damage to others by negligence in their work for their master, or to compensate the sufferer where such damage is done. The public interest may require this for the public benefit; but why should a wrongdoer have power to create such a responsibility and such a duty? No reason can be assigned. Some acts are absolutely and intrinsically wrong, where they directly and necessarily do an injury, as a blow; others only so from their probable consequences. There is no absolute or intrinsic negligence; it is always relative to some circumstances of time, place, or person. It is not negligent or wrong for a man to fire at a mark on his own grounds at a distance from others, or to ride very rapidly in his own park; but it is wrong so to fire near to, and so to ride on the public highway; and though the quality of the act is not altered, it is wrong in whoever does it, and so far it is as though it were intrinsically wrong. So the act of firing or riding fast in an enclosure becomes wrong if the person doing it sees there is some one near whom it may damage. But the act is wrong in him only for the personal reason that he knows of its danger; it would not be wrong in any one else who did not know that. Now for a willful act intrinsically wrong by a servant, the master is not liable. By a parity of reason, he ought not to be where the act, not wrong in itself, is only so for reasons personal to the servant, and his willful disregard of them. The master's liability ought be limited to that which he may anticipate and guard against, namely, the middle class of cases we have put. However this may be, it seems to us there can be no action except in respect of a duty infringed, and that no man by his wrongful act can impose a duty; and as a direc-

tion by the master to drive furiously, or in the way called carelessly, in his park, would not be wrong in the master, it cannot be made so by a trespasser getting there, and being hurt; so that, quoad the master, it is *damnum absque injuria*; and if not a wrong in the master when expressly ordered, it cannot be if done by the servant against his orders. The defendants might, if they had thought fit, have directed their servants to move and propel trucks against other trucks without any notice or precaution—in short to do what the plaintiff complains of; and if their servants chose to work on those terms, although it might be a wasteful way of using their engines and carriages, no one could say it was wrongful. Then the deceased cannot make it so by coming there himself. Upon these grounds, then, whether he is considered a wrongdoer or not, we are of opinion the action cannot be maintained, and that the plea is good.

The same consideration determines the points of pleading in the defendants' favor. "Not guilty" puts in issue the act complained of. Now, the defendants did not, by their servants, carelessly, negligently, and improperly move the trucks; nor was the deceased injured thereby by the negligence, carelessness, and improper conduct of the defendants by their servants, as such. There was no general carelessness or wrong in the act complained of—a personal wrong in the defendants' servants relatively to the deceased being there. There was, therefore, no negligence in the defendants by their servants, and they are not guilty. The verdict on that plea, therefore, must be for them.

Judgment for the defendants on the demurrer, and rule absolute to enter the verdict for them on the first issue.

SHORT NOTES OF RECENT ENGLISH CASES;

BEING A SELECTION OF ADJUDGED POINTS.

HUTCHISON *vs.* SKELTON. 2 Macqueen, 495.

Ademption.

"Cases of ademption proceed upon this ground; that if a testator makes a will, and gives that which is in the nature of a portion to his daughter, say £5,000 *simpliciter*, and afterwards in his lifetime the daughter marries,

and he gives to that daughter £1,000, even though he does not give it, as he had given it by the will *simpliciter*, but settles it upon herself for her life, and afterwards to go to her children, still that must be intended to be taken in satisfaction of what has been given by the will; because the courts, in this country at least, have not considered that the circumstance of a limited interest, such as an interest for life, being given to the daughter, and after the death of the daughter an absolute interest being given to the children of that daughter, makes any substantial difference.”—*Per* Lord Cranworth, C.

THE ATTORNEY-GENERAL *vs.* THE CORPORATION OF BEVERLEY.

6 De Gex, Mac. & G., 263.

Appeals—Duty of Judges—Hearing.

“It is generally understood to be the duty of an appellate judge to leave undisturbed a decision where he is not thoroughly persuaded that there has been error. It is, I believe in appeals, as much a rule or maxim of the English Court of Chancery as it was of the civil law, that to doubt—to entertain grave and solid doubt, is to affirm—because, to reverse is to disturb an existing state of things. Certainly, it has not been uncommon for judges, when reversing, to avow that they have hesitated, and to express distrust; nor, considering that sometimes, or perhaps often, the judge appealed from is a man not less likely to be accurate than the judge appealed to (and how often reversals and affirmances are alike reversed), does it appear to me that this can justly be blamed. But still, in whatever form, and with whatsoever sincerity, terms of deference and diffidence may be used, a reversal can scarcely proceed from a judge fit for his office, without a conviction in his own mind that he is right.”—*Per* Lord Justice Knight Bruce.

SAVERY *vs.* KING. 5 Ho. L. Cas., 655.

Constructive Fraud—Dealings between Father and Son—Solicitor and Client.

“The legal right of a person who has attained the age of twenty-one to execute deeds and deal with his property, is indisputable. But where a son, recently after attaining his majority, makes over property to his father without consideration, or for an inadequate consideration, a court of equity expects that the father shall be able to justify what has been done;

to show, at all events, that the son was really a free agent—that he had adequate independent advice—that he was not taking an imprudent step under parental influence—and that he perfectly understood the nature and extent of the sacrifice he was making—and that he was desirous of making it.

So, again, where a solicitor purchases or obtains a benefit from a client, a court of equity expects him to be able to show that he has taken no advantage of his professional position; that the client was so dealing with him as to be free from the influence which a solicitor must necessarily possess; and that the solicitor has done as much to protect his client's interest, as he would have done in the case of the client's dealing with a stranger. This duty exists on the part of the solicitor in all cases where he is dealing with any client; but, of course, where the client is a very young man, who has only just attained his majority, and who is so far unemancipated as to be still living under his father's roof as part of his family, the duty is, if not stronger, at all events more obvious."—*Per Lord Cranworth, C.*

GREENFIELD vs. BATES. 5 Ir. Ch. Rep., 219.

Solicitor purchasing from Client—Omission of Indemnity on Assignment of Leaseholds supplied, Deed being drawn by the Solicitor.

A solicitor purchased a leasehold interest from his client, and himself prepared the assignment, which contained no covenant to indemnify the vendor against any future breaches of the covenants in the lease, but did contain these words, "subject to the payment of the yearly rent, and to the performance of the several covenants in the said indenture of demise, reserved and contained, on the tenant or lessee's part to be paid, done and performed." It was held by the Lord Chancellor of Ireland, that the executor of the solicitor was bound to indemnify the vendor against the rent and covenants. "The instrument," said his lordship, "constituting the contract between the parties, conveys the property subject to the payment of the yearly rents, and to the performance of the covenants in the said indenture of demise, reserved and contained, that is to say, in words which for a time were supposed by the courts of law to amount to a covenant for indemnity. It is true that it has since been determined that they have not that effect; but they afford clear evidence, to my mind, of the intention of the parties, that the assignee was to pay the rents and perform the covenants; and that the assignor was never to be called on for that purpose.

"Here was the relation of attorney and client subsisting; the attorney prepared the conveyance to himself; he omitted to introduce the covenant which it was his duty to have inserted. *Can he be permitted to derive any benefit from his own neglect?* I do not think he can. There might, to be sure, have been a case where parties, even though standing in such a relation, might have agreed that in consideration of an additional price, the vendor would run his chance; but that would require an express agreement; and there is nothing to show me that any such agreement existed. There is nothing to cut down the liability of the attorney; in fact, the inference is quite the other way. I must therefore hold, though it appears a hard case against the respondent, that, in some form to be settled by the master, he, as executor, must give an indemnity."

TAYLOR vs. LAIRD. 1 H. & N., 266.

Contract for service—Payment at a certain Rate per Month—Abandonment of Contract before Expiration of Term—Right to recover Monthly Salary.

The defendant having contracted with the Lords of the Admiralty to provide a steam vessel for exploring the river Niger, wrote to the plaintiff as follows:—"I am willing to give you command of the steamer, destined for an exploring and trading voyage up the river Niger, and its tributaries. Your pay to be at the rate of £50 per month, commencing from the 1st December, 1853, and a commission of 20 per cent. on the net proceeds of the produce you may bring down." In reply, the plaintiff wrote to the defendant as follows:—"In answer to your letter of yesterday, offering me the command of the vessel, to go out in a trading and exploring voyage to the river Niger and its tributaries, at a fixed pay of £50 per month, and 20 per cent. on the net proceeds of the goods obtained, I beg leave to say that I accept the service and the terms you mention."

The vessel proceeded up the Niger under the command of the plaintiff, as far as Dagbo, when the plaintiff refused to proceed further, and abandoned the command.

The Court of Exchequer held, that this was not an entire contract for the whole voyage, but a contract which gave a cause of action for the salary as each month arose, and which, when once vested, was not subject to be lost or divested by the plaintiff's desertion or abandonment of the contract.

RANDELL *vs.* TRIMEN. 18 Common Bench, 786.

False Representation of Authority—Costs of Defence of a former Action induced by the Misconduct of the Defendant.

The declaration stated that the defendant, who was employed as architect by a church committee to superintend the building of a church, falsely and fraudulently represented, and pretended that he was authorized by the committee to order, and did order stone of the plaintiffs for the building of the said church for, and on account of, and to be charged to the committee, and that the plaintiffs relying on that representation, and believing that the defendant had authority from the committee to order the stone on his account, delivered the same, and the same was used in the building of the church; whereas in truth and in fact the defendant was not, as he well knew, authorized so to order the said stone. It then went on to aver, that the committee refusing to pay for the stone, the plaintiffs, trusting in the defendant's representation, sued the committee for the price, and failed in their action, and had to pay the committee's costs, and also the costs incurred by their own attorneys.

The Court of Common Pleas held, that the declaration sufficiently disclosed a cause of action; and it appearing that the defendant had no such authority as he represented, that the plaintiffs were entitled to recover, not only the value of the stone, but also the costs they had incurred and paid in the former action.

TARRANT *vs.* WEBB. 18 Common Bench, 797.

Master and Servant—Liability of Master for Accidental Injury to Servant.

The plaintiff, a painter in the employ of the defendant, sustained an injury from the failure of a scaffolding upon which he was working, and which had been erected by another servant of the defendant. In leaving the case to the jury the judge told them, that if they were of opinion that the scaffolding was erected under the personal direction and interference of the defendant, and was insufficient, or that the person employed by the defendant for the purpose of erecting it was an incompetent person, the plaintiff was entitled to recover.

The Court of Common Pleas held this a misdirection, laying down the rule that a master is not generally responsible for an injury to a servant, from the negligence of a fellow-servant; but the rule is subject to this qualification, that the master uses reasonable care in the selection of the servant.

NOTICES OF NEW BOOKS.

REPORTS OF CASES ARGUED AND DETERMINED IN THE SUPREME COURT OF TENNESSEE, DURING THE YEARS 1855-6, by JOHN L. P. SNEED, State Reporter. Volume III. Nashville: Published by C. Torbett & Co., Printers, Union and American office, 1857. pp. 768.

We were attracted to this volume by its neat mechanical execution, both of type and cover. In these particulars it certainly compares most favorably with the publications in any eastern city. An examination of the contents shows that the reporter has executed his duties in a most satisfactory manner. The syllabuses are really keys to the cases, and contain head notes which indicate the very subject matter in the cases. The volume itself embraces the usual variety to be found in any of our State reports, much that is local, some that is general, a good deal statutory law, and some common law. We give our readers an interesting case in this number, which will serve to show how both reporter and court discharge their duties.

DIGEST OF THE OPINIONS OF THE ATTORNEYS-GENERAL OF THE UNITED STATES. With References to Leading Decisions of the Supreme Court. By C. C. ANDREWS, Counsellor at Law. Washington: Published by R. Farnham. 1857. pp. 488.

We have read this volume with great satisfaction. It is the only key to a large body of important law, not at all well known to the bar, hidden in volumes not very commonly in the hands of the profession, yet embracing topics of international, public, constitutional and municipal law, to say nothing of the construction of acts of Congress and foreign treaties, which must be known by the lawyer, whose practice is extended, and whose duty calls him into the federal tribunals, or before any of the departments of the general government.

When Mr. Andrews, who has been long connected with the office of the Solicitor of the Treasury, was entrusted with the duty of preparing this Digest, a most judicious choice was made; and the result of his labor is entirely satisfactory. His long familiarity with the duties of the department has enabled him to prepare a volume eminently useful and practical, and we commend it without hesitation.

A TREATISE ON THE LAW OF BILLS OF EXCHANGE, PROMISSORY NOTES, BANKERS' CASH NOTES, AND CHECKS, by JOHN BARNARD BYLES, Serjeant-at-Law, with a patent of precedence. The seventh edition, with Notes, from the third *American* edition. London: H. Sweet, 3 Chancery Lane, Fleet street, Law bookseller and publisher. 1857. pp. 556.

For the first time probably in the history of legal bibliography, we have an English edition of an English law book, acknowledging on its title page its obligations to an American editor. "With notes from the third *American* edition," is certainly a marked compliment to the American editor; and we have also the American editor's preface presented to the English bar. The merits of Mr. Byles' work have been heretofore considered in this journal, and the notes are so well and favorably known to the profession, that they need no commendation.

A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES, comprising a general view of the Criminal Jurisprudence of the Common and Civil Law, and a Digest of the penal statutes of the General Government, and of Massachusetts, New York, Pennsylvania, Virginia and Ohio; with the Decisions on Cases arising upon those statutes. By FRANCIS WHARTON, author of "Precedents of Indictment and Pleas," "Medical Jurisprudence," "American Law of Homicide," etc. Fourth and revised edition. Philadelphia: Kay & Brother, 19 South Sixth street, Law Booksellers, Publishers and Importers. 1857. pp. 1252.

It would scarcely seem necessary to say anything in commendation of a book so well and so favorably known to the bar. But the very important additions which the learned author has seen fit to make, and the greater thoroughness and compactness of the volume, seem to demand some mention. It has always been admitted by the practitioners in the Criminal Courts, that until Mr. Wharton's first edition, no book existed which was of any very great use to the American lawyer,—the cases being found only in the Digests, and in notes appended to English treatises; but now, in this volume, every branch of Criminal Jurisprudence will be found fully exhibited, with appropriate citations and references, under its proper head. Much of the text of this edition has been re-written, and an admirable analytical index added, which fully exhibits at glance the contents of each separate paragraph. The extreme convenience of this simple table cannot be over estimated; it unlocks the whole book; and opens at a single view and

in the most compact form, the very subject matter of the text. It is a matter of surprise that legal authors should so often neglect this admirable method of exhibiting the result of their labors. To present a proper notice of the labors of Mr. Wharton in this revised edition, would require more space than we can command; but perhaps the mere announcement of a new edition will suffice.

DIGEST OF THE MARYLAND REPORTS, comprising Gills' Reports, nine vols; Maryland Reports, eight vols; Maryland Chancery Decisions, four vols. By J. SCHAFF STOCKETT, RICHARD T. MERRICK, and OLIVER MILLER, Attorneys at Law. Baltimore: Cushing & Bailey. 1857. pp. 632.

The absolute necessity of a Digest to unfold the contents of the State Reports, cannot be doubted. The labor to make one is perhaps the most disagreeable and least satisfactory professional literary work that can be engaged in. Accuracy and succinctness are indispensable requisites—absolute necessities. We cannot, of course, pretend to have examined this Digest with any great degree of thoroughness, but we have studied sufficiently, certain titles, to be able to express a highly favorable opinion of the toilsome labors of the learned editors, whose work is now presented to the profession.

The table of cases confirmed, or overruled, which is prefixed, is a most excellent and admirable addition to any Digest. The knowledge of what courts have said about cases is a kind of learning which is most useful to professional men. This table is not alphabetical, which detracts somewhat from the ease and convenience of reference; but, perhaps, could not be made so without a much larger consumption of space in the book than would have been justified. Some of the titles certainly deserve much commendation: thus, "Evidence" is very full and well executed; so the title "Equity;" "Statutes," is a most useful title; "Wills and Devises," is also very well prepared, and no doubt others which we have not examined. The learned authors deserve the thanks of their brethren for their useful labors.

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LIEN OF JUDGMENT—WHAT IT BINDS.

At common law lands were not affected by a judgment; but since the Stat. Westminster 2, 13 Edward I. c. 18, as against the defendant and his heirs, a judgment binds a moiety of all the freehold land and tenements which the debtor, or any person in trust for him, were seised of, at or after the time to which the judgment relates.¹

In Pennsylvania, the whole of defendant's freehold lands which were in his possession at the time of the judgment, are bound, but it is well settled here, that lands which were acquired by him subsequently to the judgment are not affected by it, and if aliened bona fide before execution, cannot be followed.²

If, however, such after acquired lands had remained in defendant's possession at the issue of execution, they would have been subject to levy.³ And, as a corollary to this proposition, it has been held that such after acquired lands still in the possession of defendant, are bound by the first of several executions, without regard to priority among the judgments obtained before the land was purchased.⁴ And, in Parker's Appeal,⁵ the principle has been legiti-

¹ 3 Comm. 418. Tidd Pr. p. 850, and cases there cited.

² Colhoun v. Snider, 6 Binn. 135.

³ Ibid.

⁴ Lea v. Hopkins, 7 Barr, 492.

⁵ 6 Barr, 277.

mately carried out to the extent that, an execution levied upon land acquired after the judgment, is to be preferred to another judgment obtained after both the purchase and the execution.

In the case of *Colhoun vs. Snider*, Justices Yates and Brackenridge, the latter in a very characteristic opinion,¹ labored to show that the doctrine now prevailing in England, that a judgment binds after-acquired lands, was introduced by a series of misapprehensions on the part of reporters and legal writers, as to the points really decided by the courts.

Chief Justice Tilghman, however, with his usual caution, contents himself with deciding the point, on the ground of long continued and universal usage in Pennsylvania, sanctioned by judicial decisions. He says, after citing *Rundle vs. Etwein*,² directly to the point, "It is certain that, in many instances, the common law of England has been departed from in this country from a sense of inconvenience, which has produced a silent practice not now to be traced to its origin. * * * There has been some difference of opinion respecting the common law, on this point; but I have reason to suppose, from a conversation which I once had with Judge Smith, that both he and Chief Justice Shippen (in *Rundle vs. Etwein*) founded themselves on the understanding which had long prevailed in this State. Be that as it may, my opinion is bottomed solely on the decisions which I have mentioned, and, therefore, I

¹ Speaking of the doctrine that all freehold lands which have been in the possession of the defendant at any time since the judgment, are bound by it, he says, "Supposing it to be the law of England, it may not be practicable to eradicate it in that country, it having become a rule of property, and estates having passed under it, even though upon investigation it should be evident that it has got into the system, though it did not originally belong to it: as flies, or other insects, which have been embodied when the gum or mineral oil was liquid, and cannot be got out when become hard, without breaking the amber. For as the poet sings—

Pretty in amber, to observe the forms
Of hairs, or straws, or dirt, or grubs, or worms;
The things we know are neither rich nor rare,
But wonder how the devil they got there—"

² *Rundle vs. Etwein*, 2 Yates, 23; *Canal Co. vs. Nicholson*; *Pleasants vs. Beyer*, cited 6 Binn. 137.

forbear from entering into any discussion of the common law principle."¹

The case of *Colhoun vs. Snider* has been discussed,² and its operation restricted to the exact point decided, viz., that land, to which the judgment debtor had not even an inchoate title until after the judgment was obtained, is not bound by it.

But in Pennsylvania, a judgment binds every equitable interest which the debtor has at the time it is obtained.³ Hence, since a purchaser, under articles of agreement, acquires an equitable interest in the land, though a deed has not been executed, it follows that this interest is bound by a judgment subsequently obtained.⁴ But equity looks upon things agreed to be done, as actually performed, and when a contract is made for the sale of land, equity considers the vendee as the purchaser of the estate sold, and as trustee for the vendor of the purchase money. The moment, then, the legal title is acquired, and the equity and the law united, the judgment attaches and binds the united interest.⁵

The doctrine contained in the words of Judge Duncan is somewhat too broadly laid down, and has since been restricted. It is now settled that the judgment attaches upon the subsequently acquired title only when the subsequent acquisition is in pursuance of the contract under which the original estate of freehold, held before the judgment, was obtained, not when the subsequent acquisition results from an independent contract. Thus when the owner of a life estate, against whom a judgment exists, afterwards purchases the fee from a different vendor, although, as regards the purchaser, the life estate is merged in the fee, yet, as regards the interest of the lien creditors, it is not merged, and a judgment against the owner of the life estate does not attach upon the fee simple, but is to be enforced against the life estate alone.⁶

But a judgment against a vendee, under articles of agreement, binds only his equitable title, and if the legal title is subsequently

¹ 6 Binn. 187.

² *Richter vs. Selin*, 8 S. & R. 425.

³ See *post*.

⁴ *Lynch vs. Dearth*, 2 Pa. R. 101; *Lyon vs. McGuffey*, 4 Barr, 128.

⁵ Per Duncan, J. in *Richter vs. Selin*, 8 S. & R. 425; *Foster's Appeal*, 3 Barr, 79.

⁶ *Denison's Appeal*, 1 Barr, 201.

acquired by him, subject to a *condition in the deed* for the payment of the balance of the purchase money, the judgment, though it attaches against the legal title, will be subordinated to the condition.¹ In this case, in addition to the condition *in the deed*, a bond and mortgage were given for the payment of the balance of the purchase money, but the mortgage was not recorded until over two years after its execution, and the deed was not recorded at all. The land was sold under the mortgage, and the dispute was between the vendors and creditors under judgments obtained after the execution, but before delivery of the deed, as to who were entitled to the fund. The court held that the conveyance having been made subject to the payment of the purchase money, this was an incumbrance upon the title, and valid, though the mortgage might not be so. The conclusion to which the court comes in this case, seems inconsistent with their reasoning, unless they merely meant to decide that such a condition in the deed is equivalent to a mortgage, and not within the recording statutes, which postpone even a mortgage for purchase money to subsequent judgments, if it is not recorded within sixty days from its *date*.² On any other ground it seems incontestible that the unpaid instalments still binding the land, the sheriff's vendee must take it, subject to all the equities of the judgment debtor, in whose shoes he stands, and that, therefore, the original vendor must look to the land for the unpaid instalment, and not to the fund. This, indeed is true in all cases of sale of vendee's interest under the judgment of a stranger, and it has been frequently held in such cases that the purchaser at sheriff's sale of a vendee's interest under articles of agreement, takes precisely the estate, and acquires all the rights which the vendee had.³

But in the case of a sale, under a judgment of the vendor, for the purchase money, the doctrine was originated by Kennedy, J.,

¹ *Episcopal Academy vs. Freize*, 2 Watts, 16.

² The same view was taken of the difference between a condition contained in the original deed, and a separate unrecorded mortgage, in *Irvine vs. Campbell*, 6 Binn. 120, per Tilghman, C. J. And it is there put upon the ground that the condition in the deed was notice to the purchaser.

³ *Anwerter vs. Mathiot*, 9 S. & R. 397.

that such a sale conveys the whole estate of both vendor and vendee in the land, and that consequently the vendor is entitled to claim the unpaid purchase money from the fund.¹ The vendor is considered as selling all that estate in the land, whatever it may be, which he agreed to sell and convey to the defendant. The vendor being the plaintiff in such case, and the owner of the legal estate, has the right to agree that such shall be the effect of the sale by the sheriff, under his judgment; and in order that complete justice may be done to all concerned, without delay, and with as little expense as possible, it is right and necessary that the agreement of the plaintiff to this effect should be implied from his having caused the land to be levied on and sold under his judgment. The learned judge then proceeds to comment upon the obvious advantages to be derived from the new doctrine—"By giving this effect to the sale, complete justice is more likely to be done, perhaps to every one concerned, than could be had in any other course of proceeding that could be adopted. It will enable those who have a notion of buying, to ascertain beforehand, with certainty, the nature, extent, and value of the estate that is about to be sold, which is indispensably necessary, in order to obtain anything near a fair price for it. The precise nature and extent of the estate being known at the time of the sale, and it being known also that it is to be sold free,

¹ *Love vs. Jones*, 4 Watts, 465. The principle is the same as that which governs in the sale of land by a mortgagee under a judgment on the bond accompanying the mortgage. There, it is said by Gibson, J., in *McCall vs. Lenox*, 9 S. & R. 807, "With us, the practice has been universal, when the land has been pursued on the bond, to sell without any reservation of the lien of the mortgage; and the purchaser is, therefore, always considered as having acquired the legal as well as the equitable estate." And Duncan, J., is still more explicit. He says (9 S. & R. 316) "I consider the law in Pennsylvania to stand thus, that on the sale of lands on a judgment on bond, secured by mortgage, by the sheriff, though that judgment is posterior to the execution of the mortgage, the purchaser acquires all the title of the mortgagee, and will hold against all subsequent incumbrances of whatever nature, mortgages, or judgments." And afterwards, he repeats, "I deny the right of the mortgagor to proceed either by *scire facias*, or ejectment, to disturb such purchaser at sheriff's sale, and contend that it is not the equity of redemption (merely) that is sold, but all the title of the mortgagor at the time of the execution of the mortgage."

and discharged from all incumbrances, it is clear that every possible inducement which can be afforded in a cash sale, is held out by this course, to encourage persons disposed to buy, to give the full value of the estate. The sale being thus effected under regulations suited to obtain, as it would seem, the highest possible price for the land, it only remains, in order to effectuate justice, that the money or price should be distributed among the parties, according to the priority of their respective liens. That the claim of the vendor to the unpaid purchase money, if he has any lien at all as vendor, stands first in the list of liens, and must, therefore, be paid in preference to all others, cannot be questioned; after this, all other liens must be paid according to the priority of their respective dates. Principles of policy as well as justice, seem to favor and support this doctrine strongly: because, while it secures to all parties the full benefit of their respective rights, it gives to the vendor, by one action alone, all that he could obtain otherwise by two, or more, in many instances. For if, after obtaining his judgment for the recovery of the purchase money remaining unpaid, it were to be held that he could have nothing sold under it but the vendee's equitable interest in the land, and that the proceeds thereof must be appropriated first to the satisfaction of all liens thereon, prior in date to that of the vendor's judgment, and growing out of the acts of the vendee; and the money arising from the sheriff's sale should, from this or any other cause, prove insufficient to satisfy the vendor's claim, he must then, if the vendee be without other means to satisfy his judgment, have recourse to the action of ejectment in order to get the land back."¹ The learned judge then suggests other complications which might occur if any other effect than the one recommended, were given to a sale under the judgment of a vendor.

Notwithstanding the obvious advantages of the doctrine settled in *Love vs. Jones*, the court in the subsequent case of *Day vs. Lowrie*² established a distinction in the case where the vendor becomes himself the purchaser at the sheriff's sale, under his own judgment, and held on the authority of *Purviance vs. Lemmon*,³ and *Chew vs. Mather's Administrators*,⁴ (both prior to *Love vs. Jones*) that this

¹ *Love vs. Jones*, 4 Watts, 472.

² 16 Serg. & Rawle, 292.

³ 5 Watts, 412.

⁴ 1 Pa. Rep. 474.

rescinds the contract, and the vendor having before the legal, now acquires the equitable estate, and, having lost all remedy for the unpaid residue of the purchase money, must come upon the fund arising from the sheriff's sale for the amount of his judgment, in preference to the intervening creditors of the vendee. So far *Day vs. Lowrie* agrees in effect with *Love vs. Jones*, but the learned judge (Sergeant) who delivered the opinion of the court, goes on to say, "Had a third person purchased, the prior judgment creditors of the vendee would have been first entitled to payment from the proceeds of the sale, *because the equitable estate would still subsist and remain liable to the original vendor in the hands of the new purchaser.*"¹ And *Wilson vs. Stowe*,² which was the case of a purchase by a stranger at a sheriff's sale, under the judgment of a vendor for unpaid purchase money, was decided in accordance with this dictum of Mr. Justice Sergeant. In that case Chief Justice Gibson said, "When the vendor sold it (the equitable interest of vendee) by execution, he sold not his legal title along with it, and a supposition that he did is the root of the fallacy. The execution was levied not on the fee, but on the vendee's interest in it; for no man willingly sells his own estate on his own execution."³

However curious it might be to examine the authorities cited, and ascertain how far they sustain the positions of the court in *Day vs. Lowrie*, and *Wilson vs. Stowe*, it is no longer necessary, for in *Horbach vs. Riley*⁴ the court overruled *Wilson vs. Stowe*, and exploded the distinction taken in *Day vs. Lowrie*, between the purchase at the sheriff's sale by the vendor and by a stranger. In this case the opinion of the court was delivered by Rogers, J., who says, "It would be no difficult matter to reconcile the cases of *Wilson vs. Stowe*, and *Day vs. Lowrie*, as one was a purchase by a stranger, and the other by the vendor; but we are willing to admit that the distinction is rather plausible than sound; that the law is the same whether the property be purchased by one or the other." His honor then proceeds to make a rather extraordinary admission. "It must be remarked that in *Wilson vs. Stowe*, *Day vs. Lowrie* was not cited on the argument, and that although *Love vs. Jones* was

¹ 5 Watts, 417.² 10 Watts, 484.³ 10 Watts, 487.⁴ 7 Barr, 81.

cited, *yet it is nowhere noticed in the opinion of the court.*"¹ He continues, "The groundwork of that opinion is, that by the sale, the vendor's title did not pass to the sheriff's vendee. Granting the position, there is no gainsaying the conclusion. * * * * But in this (position) the court was in error, for that the vendee under such circumstances acquires the legal as well as the equitable estate had been ruled in the two cases cited."² I have some reason to believe that we were misled by the dictum of Mr. Justice Sergeant, in *Day vs. Lowrie*, who did not advert to the decision in *Love vs. Jones*." His honor then cites, with approbation, portions of the opinion in *Love vs. Jones*, which are given above somewhat at length, and concludes his quotations thus: "This case is precisely in point, and explodes the distinction between a purchase by a stranger and by the vendor, and had it been cited in *Day vs. Lowrie*, we should have been spared the dictum of Mr. Justice Sergeant; and had both cases been adverted to in *Wilson vs. Stowe*, we should never have been troubled with this case."³

The doctrine that a sale on the judgment of the vendor against the vendee, under the articles, conveys the whole united interest of vendor and vendee, and leaves the vendor to resort for the unpaid purchase money to the fund arising therefrom, may, after all its fluctuations, be considered as settled for the present, inasmuch as the court in a recent case⁴ in the last volume of Harris's Reports, went considerably out of their way to express their approbation of it, and nothing is found in the two volumes (1st and 2d Casey) which have appeared since, to indicate any change of opinion.

It was said at the commencement of this article, that in Pennsylvania the whole of defendant's freehold lands, which were in his possession at the time of the judgment, are bound by it. This is true, not only of his lands but of any legal title, contingent or

¹ That is to say, the court overruled a point decided, after full discussion, in a former case, without once adverting to the fact, perhaps without being aware of it, that the point had ever been raised or settled.

² *Love vs. Jones*, 4 Watts, 465; *Day vs. Lowrie*, 5 Watts, 412.

³ 7 Barr, 83.

⁴ *Vierheller's Appeal*, 12 Harris, 105.

otherwise, in lands where there is a *real interest* vested in the debtor at the time of the judgment, though unaccompanied by possession.¹

Thus the legal title retained by the vendor, under articles of agreement for the sale of lands, is bound to the extent of his interest at the time of the judgment. And on a sale under such judgment, the sheriff's vendee stands precisely in the situation of the original vendor, and may bring ejectment for the unpaid purchase money.²

And the lien of a judgment against the vendor upon the unpaid purchase money, is not divested by a sheriff's sale of the original vendee's interest.³ And judgments against the vendor and vendee by different creditors, bind the rights of each, and after a sale by the sheriff under such judgments, the purchasers stand towards each other in the relation of the original vendor and vendee.⁴

So the interest of a widow in the real estate of her deceased husband, which has been put by our Act of April 19th, 1794, upon the footing of a rent charge, is bound by a judgment against her.⁵ And this, whether she takes under a will, or the statute of distribution. And her right to dower is bound by a judgment obtained before assignment.⁶

A husband's curtesy in his wife's lands is likewise such an interest as may be bound by a judgment against him; and the birth of issue is not necessary, under our act, in order to give him a tenancy by the curtesy initiate which may be bound. And where lands to which the wife is co-heiress, have been ordered to be appraised in proceedings in partition, but have not been sold or accepted by the

¹ Lessee of Humphreys *vs.* Humphreys, 1 Yates, 429.

² M'Mullen *vs.* Wenner, 16 S. & R. 18; Stewart *vs.* Coder, 1 Jones, 20. It might be a curious question whether, if a vendor should, after a judgment against him, bring ejectment against the vendee and dispossess him, the judgment would bind the recovered lands. In Richter *vs.* Selin (8 S. & R. 425) it was decided that a judgment against an equitable interest in lands, expands in order to embrace the subsequently acquired legal interest, and it is difficult to see why the same should not hold in the converse case. The case of Stewart *vs.* Coder, 1 Jones, 90, which decides that a judgment against the vendor is a lien upon the unpaid purchase money, seems to settle the point, for the recovered land would certainly stand in the place of the unpaid instalments.

³ Creigh *vs.* Shatto, 9 W. & S. 82.

⁴ Chahoon *vs.* Hollenback, 16 S. & R. 425.

⁵ Shaupe *vs.* Shaupe, 12 S. & R. 12.

⁶ Thomas *vs.* Simpson, 3 Barr, 69.

other heirs at the date of the judgment against the husband, his estate in them is bound, and this lien continues against securities given for the wife's share of the valuation.¹

So a vested remainder to take effect upon the determination of a life estate, is bound by a judgment against the remainderman.²

In the case of *Ammant vs. The New Alexandria and Pittsburg Turnpike Co.*,³ however, the court decided that under the charter, no interest in the land that could be subject to execution, was conferred upon the company, but only a right to enter upon land for the purpose of constructing a road and to take tolls, and that, therefore, the road could not be taken in execution, as "the defendants had no tangible interest—nothing which could be delivered by the sheriff to a purchaser under the execution. There was no rent or profit of any kind issuing out of land; nothing but a right to receive toll for horses, carriages, &c., passing over the land. Every kind of right of license granted by the act of Assembly, was confined to the company. They alone were confided in. They alone were looked to for a faithful performance of the important duties incumbent on them. * * * There is nothing in the incorporating act which authorizes the company to transfer their right to other persons; and such transfer would certainly be inconsistent with the whole design and object of the law. * * * If a turnpike company has a right to land or other property not on the road, there is no reason why it should not be subject to an execution."⁴ Upon this, the court, in the subsequent case of *Leedom vs. The Plymouth R. R. Co.*,⁵ grounded their decision that the right of taking tolls by a road company from passengers and freights, is a species of incorporeal hereditament incident to the road which cannot be bound by a judgment. They say,⁶ "The plaintiff could claim a priority out of the tolls collected, only on the ground that his judgment gave him a lien upon them. To have this effect, he must make out that these tolls were such an interest in land existing in the corporation at the

¹ *Lancaster Bank vs. Stauffer*, 10 Barr, 898.

² *Lessee of Humphreys vs. Humphreys*, 1 Yates, 429.

³ 13 S. & R. 210.

⁴ *Per Tilghman, C. J.*

⁵ 5 Watts & Sergeant, 265.

⁶ *Per Sergeant, J.*

time when the judgment was rendered, as to be bound by it. The road itself could not be taken in execution, (here the learned judge cites the case given above) and for the same reason is not bound by a judgment: much less is the right of taking tolls from passengers and freights, which is a corporate franchise—a species of incorporeal hereditament incident to the road. 2 Black. Comm. 38.”

And in pursuance of the spirit of these decisions which is, “that privileges granted to corporations to construct turnpike roads, canals, &c., are conferred with a view to the public use and accommodation, and that they cannot voluntarily deprive themselves of the lands and real estate and franchises which are necessary for that purpose; nor can they be taken from them by execution and sold by a creditor, because to permit it would tend to defeat the whole object of the charter, by taking the improvements out of the hands of the corporation and destroying their use and benefit,”¹ the court decided in *The Susquehanna Canal Company vs. Bouham*² that the toll-houses of a company, though not directly on the line of their works, cannot be taken in execution.

Even a contingent title to land accompanied with a real interest is bound by a judgment. Thus, where a grantor conveys land to trustees on a charitable use, expressly reserving to himself, his heirs and assigns, a right of entry on condition broken, he has such an interest remaining in the land as is the subject of levy and sale on execution, even before a breach of the condition: and on such breach afterwards occurring, the sheriff's vendee may enter.³ And where a lease was made to one and his heirs for forty-nine years, reserving to the lessee the privilege of building, with a covenant by the lessor to purchase the improvements at the end of the term, or convey to the lessee, his heirs and assigns, the land at a valuation, and the lessee afterwards erected valuable buildings, it was held that he had such an interest in the premises as was bound by a judgment.⁴

But the contingent interest liable to be bound by a judgment must be of freehold; hence a lease to one, his executors and ad-

¹ Per Sergeant, J. 9 Watts & Serg. 28.

² 9 Watts & Serg. 27.

³ *M'Kissick vs. Pickle*, 4 Harris, 140.

⁴ *Ely vs. Beaumont*, 5 S. & R. 124.

ministrators for twelve months, and so from year to year as long as both parties please, with a covenant not to assign without the special license of the lessor, and a proviso that, if the lessor determine the lease, the improvements of the lessee are to be paid for after their value is ascertained in a certain way, does not vest any title to the freehold in the lessee, so as to subject his interest to the lien of a judgment.¹ The distinction between these two cases as explained by Huston J. in Krause's Appeal is that in the former the lessee had a contingent interest in the realty dependent upon the failure of the lessor to compensate him for his improvements, while in the latter there was no such interest in the land but a mere right to compensation in money. The first being an interest in the land, however remote, could be bound by a judgment, the latter, being mere personalty, could not.

So a contingent estate in realty, limited by executory devise, is subject to the lien of a judgment, and may be levied on and sold during the continuance of the previous estate.²

But a judgment against a trustee is no lien upon his bare legal title.³ And a limitation in a deed of trust of a *contingent* percentage on the trust fund as a compensation to the trustee does not create such an interest in him, as to subject the trust estate to an execution for his debts.⁴ Though if the trust be accompanied with a beneficial interest in the subject matter this is an estate in the trustee which will be bound by a judgment against him.⁵

But not only is every legal estate of freehold vested in the defendant at the time of the judgment bound by it, in Pennsylvania; the lien of the judgment in this State embraces also every kind of equitable interest in lands. This anomaly in our practice has arisen from the want of a court of equity here (owing to the jealousy of chancery powers and forms always entertained by our legislatures from the origin of the colony) and the consequent necessity imposed on the common law courts, of attaining the ends of justice,

¹ Krause's Appeal, 2 Wharton, 398.

² De Hoas vs. Bunn, 2 Barr, 335.

³ Reed's Appeal, 1 Harris, 478.

⁴ Ashurst vs. Given, 5 W. & S. 323.

⁵ Drysdale's Appeal, 3 Harris, 457.

in cases of equity jurisdiction, through the medium of common law forms whenever possible. In England the lien of a judgment does not attach to any equitable estate, but there the creditor may have relief through the court of chancery; here we have no such resort, and our courts have therefore, from necessity, established it as a principle, that both judgments and executions have an immediate operation on equitable estates, and on the *venditioni* the sheriff sells and conveys all the debtor's right, such as it may be.¹

The interest of a vendee under articles of agreement for the sale of land has already been seen to be bound by a judgment against him. But the extent of the interest so bound has been the subject of much discussion in our courts. The principles settled in numerous decisions are briefly these: Written articles of agreement for the sale of lands vest immediately an equitable estate in the vendee which will be bound by a subsequent judgment against him if the contract is afterwards executed, though no part of the purchase money had been paid nor possession given at the date of the judgment² and as the interest of vendee is enlarged by successive payments of the purchase money or the paying off of prior incumbrances, the lien of the judgment expands so as to include the enlarged interest.³ And consequently, when the title of the vendee

¹ *Carkhuff vs. Anderson*, 8 Binn. 9, per Tilghman, C. J.; *Anwerter vs. Mathiot*, 9 S. & R. 897; *Lynch vs. Dearth*, 2 Pa. R. 101; *Carneghan vs. Brewster*, 2 Barr, 41; *Thomas vs. Simpson*, 8 Barr, 60. So an improvement right may be levied on and sold at sheriff's sale, and the purchaser may continue and complete the settlement by means of a tenant in possession. *Myers vs. Myers*, 8 Watts, 430.

² *Stephens' Appeal*, 8 W. & S. 186.

³ *Stephens' Appeal*.—The inconvenience which would result from the opposite rule, that each judgment binds only the interest of the vendee actually existing at the time it was obtained, and the confusion which would arise in the case of different judgments obtained against the purchaser of an estate payable by instalments was clearly foreshadowed by Duncan, J. in *Richter vs. Selin*, 8 S. & R. 425. The rule which now obtains, that each judgment binds the interest at the time it was obtained, and has the benefit of all subsequent payments up to the time of the sheriff's sale (which disposes of the vendee's whole existing estate together with his equitable right to demand a conveyance upon the completion of the payments) is intelligible and just, inasmuch as it allows all the judgments to come upon the fund in the sheriff's hands in the order of their priority, without complicating the distribution of the proceeds by any question as to the amount which had been paid at the date of each judgment.

is perfected by payment and a conveyance, the judgment binds the whole legal and equitable estate which are now united.¹ *A fortiori* it follows that when there has been a part performance of the contract contained in the written articles, either by payment of a portion of the purchase money, or by taking possession of the land, the vendee has an equity which will be bound by a subsequent judgment.²

But a mere oral agreement to purchase land does not vest an estate until it is executed, nor is mere payment of a portion of the purchase money such an execution of such an agreement, as will vest in the vendee an equitable estate which can be bound by a judgment.³ Though delivery of possession of land, in pursuance of a parol contract, amounts to a part performance, and the vendee as well as the vendor may insist on specific execution of the contract. Hence if in such case, one authorized by the vendor to deliver the possession to the vendee takes a lease of the land from the vendee and enters into actual possession, there is an equitable estate in the lessor which is bound by a judgment against him.⁴

A judgment may therefore bind an equitable or even an inchoate interest in lands, but that interest must be an estate in the lands themselves. The interest of a mortgagee, judgment creditor, owner of a legacy charged on land, creditor of an intestate estate, mechanic or material-man, or of a preferred creditor under an assignment to trustees (to whom the land is debtor) is not the subject of judgment, for these are interests not in land but in the proceeds of land.⁵ Hence the interest of a devisee in lands ordered by the will

¹ Richter *vs.* Selin, 8 S. & R. 425; Morrison *vs.* Wurtz, 7 Watts, 437.

² Lynch *vs.* Dearth, 2 Pa. R. 101; Hartman *vs.* Stahl, *Ib.* 223; The Episcopal Academy *vs.* Frieze, 2 Watts, 16; Catlin *vs.* Robinson, *Ib.* 373; Baird *vs.* Lent, 8 Watts, 423; Foster's Appeal, 3 Barr, 80; a sale by the sheriff is attended with the ordinary consequences of a sale by an individual, Stoever *vs.* Rice, 8 Wharton, 24, hence a purchaser at a sheriff's sale before his deed has been acknowledged has an inchoate interest in the land, by the contract, which may be bound by the lien of a judgment, Morrison *vs.* Wurtz, 7 Watts, 437.

³ Miller *vs.* Specht, 1 Jones, 456.

⁴ Pugh *vs.* Good, 3 W. & S. 56; and see also Anwerter *vs.* Mathiot, 9 S. & R. 397; Chaheon *vs.* Hollenback, 16 S. & R. 425.

⁵ Per Gibson, C. J. in Morrow *vs.* Brenizer, 2 Rawle, 183.

to be sold, and the proceeds or a portion thereof paid over to him, is not bound by a judgment obtained against him, because the legatees have no estate in the lands themselves but only in the execution of the trust and in the proceeds arising therefrom.¹ But the legatees, where proceeds of land to be sold are directed by the will to be divided among them, may elect to take the land instead of the proceeds of the sale, and after such election it becomes the subject of lien, and may be sold upon a judgment.² So where a house and lot were devised by a father to trustees in trust to pay over the rents to his son during life, and after the son's death to his appointees, or in default of appointment to his heirs, with powers to the trustees and son conjointly to change the investment and also to convey the property to the son absolutely in case he is relieved from embarrassment; it was held that the son took no estate in the land that could be bound by a judgment.³ Upon the same grounds it was decided in *Kramer vs. Arthurs & Nicholson*,⁴ that a member of a partnership established for the purpose of dealing in land has no interest in the land itself but merely a resulting interest in the proceeds, and that it is not so bound by a judgment for his separate debt, that it could be pursued in the hands of a vendee, though a sale on a judgment of a partnership creditor, while the title still remained in the partnership, would pass the lands, whether as such, or as chattels; and a joint stock company dealing in lands is virtually a partnership.⁵

But where a person has not merely a beneficial interest in the proceeds of the land but is also the possessor of the legal title as sole trustee for himself and others, he has such an estate in the land as will be bound by a judgment against him, and on a sale in pursuance of the power by a trustee substituted in his place, the judgment creditor of the original trustee is entitled to be paid out of the proceeds in preference to one to whom the original trustee had assigned his interest subsequent to the judgment.⁶

¹ *Allison vs. Wilson's Executors*, 18 S. & R. 380; *Morrow vs. Brenizer*, 2 Rawle, 188; *Selfridge's Appeal*, 9 W. & S. 55; *Stuck vs. Mackey*, 4 W. & S. 196.

² *Stuck vs. Mackey*, supra. ³ *Vaux vs. Parke*, 7 W. & S. 19. ⁴ 7 Barr, 165.

⁵ *Kramer vs. Arthurs and Nicholson*, 7 Barr, 165.

⁶ *Drysdale's Appeal*, 8 Harris, 457.

RECENT AMERICAN DECISIONS.

*In the Supreme Court of Vermont.*LEWIS CHATFIELD vs. WALTER M. WILSON.¹

1. There are no correlative rights existing between the proprietors of adjoining lands, in reference to the use of the water in the earth, or percolating under its surface. Such water is to be regarded as part of the land itself, to be enjoyed absolutely by the proprietor within whose territory it is; and to it the law governing the use of running streams is inapplicable.
2. An act legal in itself, and which violates no right, cannot be made actionable on account of the motive which induces it.

Action on the case for the disturbance of a water course. The declaration contained three counts, the first and second charging the defendant with having lowered and changed the channel of a brook, which divided the farms of the plaintiff and defendant, and diverting the water therein; and the third complained of an interference by the defendant, with the natural flow or passage, by percolation, of the water through the defendant's land, to the plaintiff's, by means of which a reservoir or tub on the plaintiff's land was supplied with water. Plea, the general issue; trial by jury, March Term, 1855,—POLAND, J., presiding.

The plaintiff's evidence tended to prove that the defendant's farm lay north and east of the plaintiff's; and that the plaintiff's farm and the defendant's land lying north of it were divided by a small brook, which came from a spring further east on the defendant's land, and run westerly, and that sometimes, in the summer, the brook would become wholly dried up. At the north-east corner of the plaintiff's farm, and on the south side of the brook, there was a small piece of level ground, some ten or fifteen feet wide, and extending up and down the brook about two rods, which was partly on the plaintiff's land, and partly on the defendant's land lying east; that this piece of flat ground was wet, porous and spongy, so that by digging into it the cavity would fill with water; that, prior

¹ We are indebted to the learned State Reporter, Mr. Williams, for this interesting case.—*Eds. Am. Law Reg.*

to the act of the plaintiff in laying his aqueduct as hereinafter stated, there was no water apparent on the surface of this piece of flat ground, and no appearance of a spring of water there, but that the water in the soil came from the brook above by percolation through the soft soil and upon the surface of the flat rock under the soil; that some four or five years previous to the spring of 1852, the plaintiff, by leave of the defendant, dug a hole in this piece of flat ground, a few feet over the line on the defendant's land, and in this hole placed a tub which filled with water, and laid an aqueduct of lead pipe from the tub to his buildings, and from that time up to the spring of 1852, procured in this manner an ample supply of water for his buildings, for which he paid the defendant annually the sum of one dollar and fifty cents; that in the spring of 1852, there was some difficulty between the plaintiff and the defendant, and the defendant notified the plaintiff to remove his tub and pipe from the defendant's land, and the plaintiff, accordingly, took up his tub, and placed it in a hole in the flat ground on his own side of the line, but within a short distance of it, and also very near the bank of the brook; that his lead pipe was placed in this tub, and that he continued to be well supplied with water until about the first of July, 1852; that the tub, when placed on the plaintiff's own land, was sunk to the depth of a foot or more below the channel of the brook, and that the tub and aqueduct were supplied with water by the filtration of the water from the brook directly, and also through the soil and under the soil, on the defendant's side of the line. The plaintiff's evidence also tended to prove that about the 1st of July, 1852, the defendant dug away and lowered the channel of said brook, beginning some two or three feet above, and east of the plaintiff's corner, and extending twelve or fifteen feet below, so that the water of the brook was thereby made to run in the new channel, two or three feet further north, and about a foot lower than before; that the defendant also dug a channel from the hole where the plaintiff's tub had formerly stood in his land, out into the channel of the brook, so as to carry all the water which collected there into the new channel he had made for the brook, above the plaintiff's corner; and that the defendant filled up the

side of this channel, from the hole or spring to the brook on the side next to the plaintiff's tub, with dry hard earth, so as to prevent any filtration of water, through or under the soil on his land, to the plaintiff's tub, and that these acts of the defendant, prevented the water from accumulating in the plaintiff's tub, either *from the brook directly or through or under the soil of the defendant's land, and that the plaintiff thereby was wholly deprived of water by his said aqueduct*; and that these acts of the defendant were not necessary, and were not done by the defendant with any purpose of supplying himself with water for any purpose, but solely with the design of thereby depriving the plaintiff of water by his aqueduct. The defendant claimed, and his evidence tended to prove, that previous to the plaintiff's putting his tub and pipe into the defendant's land, as above stated, there was an open, visible spring of water, where the tub was placed, the water from which flowed north into the brook on the defendant's land, in a natural channel, and that there was never any such flow of the water of the brook through or under the soil on the defendant's land, as the plaintiff claimed. The defendant also claimed that the plaintiff's tub, after the same was placed on his own land, was not supplied with water by the natural percolation of the water through the soil, either from the brook, or from the water of this land or spring, but that it was supplied with water from the defendant's spring, through a blind or underground ditch, which the plaintiff had made without his license or permission, and that the only effect of his acts, of which the plaintiff complained, was to restore the flow of the water to its natural condition, as it was before any thing had been done by the plaintiff. The defendant also claimed that what was done by him, was done for the purpose of providing water for his pasture, and not to injure the plaintiff; and he also denied making any change of the channel of the brook, as claimed by the plaintiff. The charge of the court relative to the turning of the channel of the brook was not excepted to. In relation to the other part of the case, the court charged (among other things not excepted to,) that the defendant had a right to prevent the flow or escape of water from his own land to the plaintiff's tub by any artificial means that the plaintiff had used to ob-

tain it, and that he might lawfully do all that was necessary to restore the water to its natural flow, and that it was not material what his purpose or motive was; and that the defendant would not be liable for any act of his, upon his own land, in preventing the natural flow or escape of water, in or under the soil, from his land to the plaintiff's, provided such act was done for the purpose of reasonably providing himself, or his farm or cattle, with a supply of water; but if they found that the acts of the defendant did prevent the *usual* and *natural* flow of the water, in or under the ground from the defendant's soil to the plaintiff's, and that these acts were done by the defendant solely with the purpose of injuring the plaintiff, and depriving him of water, and not with any purpose of usefulness to himself, then he would be liable to the plaintiff for such damages as he thereby sustained. The jury returned a verdict for the plaintiff on all the counts in his declaration. To so much of the charge as is above detailed, the defendant excepted.

The opinion of the court was delivered by

BENNETT, J.—This is the first time, within my knowledge, that the question has ever come before our courts, in relation to the rights of adjoining proprietors of lands to water percolating under the surface, through wet and porous ground, and the case may be considered somewhat important in principle, as well as novel, in this state. The court below, on this point, told the jury, in substance, that the defendant had the right to prevent the escape of water from his own land to the plaintiff's tub, which he had sunk on his own land, and that he might lawfully do all that was necessary to restore the water to its *original* flow, and that it was not material what his view was; and that he had the right, on his own land, to prevent the natural flow or escape of water, in or under ground, from his to the plaintiff's land, provided it was done to secure, in a reasonable manner, a supply of water for himself, his farm, and cattle; but if done *solely* to injure the plaintiff, and deprive him of water, and not to benefit himself, then he would be liable. This charge is evidently based upon the ground that there were certain

correlative rights existing between these parties, in the use of the water percolating in and under the surface of the earth. The rules of law which govern the use of a stream of water, flowing in its natural course over the surface of lands belonging to different proprietors, are well settled, and the *correlative rights* of the adjoining proprietors are clearly defined. Each proprietor of the land has the right to have the stream flow in its natural course over his land, and to use the same as he pleases for his own purposes, not inconsistent with a similar right in the proprietors of the land above or below him, but no proprietor above can diminish the quantity or injure the quality of the water, which would otherwise naturally descend, nor can any proprietor below throw back the water upon the proprietor above, without some license or grant. But we think the law governing running streams is not applicable to underground water, and that no light can be obtained from the law of surface streams; and if it is to be established that there are *correlative* rights existing between adjoining proprietors of land, to the use of water percolating the earth, an entire new chapter in the law will be necessary to define what these right are, and to put them on some tangible and practical ground, that the rules concerning them may be applied to common use. But from the very nature of the case, this seems impracticable.

The laws of the existence of water under ground, and of its progress while there, are not uniform, and cannot be known with any degree of certainty, nor can its progress be regulated. It sometimes rises to a great height, and sometimes moves in collateral directions, by some secret influences, beyond our comprehension.

The secret, changeable, and uncontrollable character of underground water, in its operations, is so diverse and uncertain that we cannot well subject it to the regulations of law, nor build upon it a system of rules, as is done in the case of surface streams. Their nature is defined, and their progress over the surface may be *seen* and *known*, and is *uniform*. They are not in the earth and a part of it, and no secret influences move them, but they assume a distinct character from that of the earth, and become subject to a certain law,—the great law of gravitation.

There is, then, no difficulty in recognizing a right to the use of water flowing in a stream as *private property*, and regulating that use by settled principles of law. We think the practical uncertainties which must ever attend subterranean waters, is reason enough why it should not be attempted to subject them to certain and fixed rules of law, and that it is better to leave them to be enjoyed absolutely by the owner of the land, as one of its natural advantages, and in the eye of the law a part of it, and we think we are warranted in this view by well-considered cases.

In the case of *Acton vs. Blundell et al.*, 12 M. & W. 324, it was held that the owner of land, who had made a well in it and thereby enjoyed the benefit of underground water, had no right of action against an adjoining proprietor who in sinking for and getting coal from his own soil, in the usual and in a proper manner, caused the well to become dry. A query is added, whether it would have made any difference if the well had been enjoyed by the plaintiff for more than twenty years. In the case of *Roath vs. Driscoll*, 20 Conn., 583, the doctrine is fully advanced, that no right is gained by a mere continued pre-occupancy of water under the surface by any artificial means for a period of fifteen years or more. The court say, "each owner has an equal and complete right to the use of his land and to the water which is *in it*;" and they say, "the water combined with the earth, or passing through it by percolation, or by filtration, or chemical attraction, has no *distinctive character of ownership* from the earth itself, any more than the metallic oxydes of which the earth is composed;" and they further add, "water, whether moving or motionless, *in the earth*, is not, in the eye of the law, distinct from the earth." If it is true that subterranean water is to be treated as a part of the earth, it must follow that there are no *correlative rights* in the enjoyment of such water between adjoining proprietors of land, and both the cases in the 12th of M. & W. and 20 Conn., proceed upon this ground. The case of *Greenleaf vs. Francis*, 18 Pick. 117, goes upon the same principle, and it was there held that no action would lie against a man who dug a well on his own land although he thereby took the water from his neighbor's well, in the absence of all right acquired by grant, or an

adverse user. The case is really put upon the ground that "every one has the liberty of doing, on his own ground, whatever he pleases, even though he occasion some damage to his neighbor;" and the court say: "there is nothing in the case, then at bar, which limited or restrained the owners of the estates severally, from having the absolute dominion of the soil extending upwards, and below the surface, as far as each pleased." This, in effect, negates the position that there can be, upon common principles, *correlative rights* in underground water.

The case of *Dickinson vs. The Grand Junction Canal Company*, 9 Eng. Law and Eq. 520, is not opposed to the views taken in the foregoing cases. In that case the water was proved to have been taken from the river, after it formed a part of the stream, not by reasonable use by another riparian proprietor, but by digging a well; and this was treated as a diversion of *surface water*, and *actionable* at common law; and, in regard to the abstraction of the water which never did form part of the river, but had been prevented from doing so by sinking of the wells, it was held, that the mill-owners, being entitled to the benefit of the stream in its natural course, were deprived of part of that benefit if the natural supply of the stream was cut off, and might have their action, whether the water cut off was a part of an underground water course or percolated through the strata of the earth. In this case the injury complained of was the diminution of water in a surface stream, and the law applicable to surface streams was applied. The cases cited by the plaintiff's counsel, which relate to surface streams, can give little or no aid in the question before us. The case of *Smith vs. Adams*, 6 Paige, 485, is also a case where the underground water, which was cut off by an excavation on the defendant's land, supplied a spring, and this spring caused a flow of surface water, and the decision was, that the person who had the right to the use of the water in its natural course, or, by a prescriptive right, out of its natural course and was injured by the excavation, might have redress for the injury. Here, too, the person complaining was injured in his rights to the use of flowing water. Such is also the case in *Balston vs. Benstead*, 1 Campbell, 468, and no doubt other cases of a like character may be found in the books.

There is no ground to claim that the plaintiff has been injured in his right to the use of water in a surface stream flowing in its natural channel, so far as the case is now before this court, and he can claim no prescriptive right to the water.

The tub was sunk by the plaintiff on his own land, in 1852, and as his evidence tended to prove, a foot or more below the channel of the brook, and that, from this tub, the water was taken by artificial means for the use of the plaintiff; and the case shows that the plaintiff's evidence tended to prove that this tub was supplied with water, which filtrated under ground from the brook, and also from the adjoining land of the defendant; and the case, so far as it is sent up to us, only concerns the right of the defendant to cut off the *filtration* of the water from his own land to the plaintiff's tub by artificial means, and the consequences, if *wantonly done*.

This then, is fairly a question as to the rights of the plaintiff in underground water. Putting this case, then, upon the ground that the water in question, while in the earth of the defendant, though percolating through it, is not distinct from it, in the eye of the law it becomes an important inquiry whether the act of the defendant, in the obstruction of the under ground water upon his own premises, can be made actionable, simply upon the ground that the motive was bad which induced it. The act of the defendant in the obstruction of the water, being in itself lawful, could not subject the defendant to damages unless, by reason thereof, some right of the plaintiff has been violated. The maxim, "*Sic utere tuo, ut alienum non laedas*," applies only to cases where the act complained of violates some legal right of the party; and it has been attempted to be shown that this underground water cannot be made the subject of *correlative rights*. It is said in Comyn's Digest, under the head of Nuisance, that an action on the case does not lie for the *reasonable* use of any right, though it be to the annoyance of another. This, it may be said, implies that an action would lie if the use of one's right was *unreasonable*.

This, no doubt, is true, under proper limitations, as in cases where there is a right common to both parties, as in the use of a public highway, or of the air; or where there is a duty to perform,

and a *correlative* right growing out of it, as the repair of a ruinous house standing so near to the house of another, as to endanger it from its fall. In such a case, no doubt, a repair could be compelled; and, in case of the fall, an action would lie for the special damage. There are also many cases in the books, relating to the relative use of surface streams, where the case has turned upon the question, whether the use was reasonable, and for the party's own convenience or benefit, or wanton and malicious, and done to prejudice the rights of another. In such cases there are *correlative* rights to the use of the water, and the boundary of the right is a *reasonable use* of it. But such cases have no analogy to the case at law, and it may be laid down as a position not to be controverted, that an act legal in itself, violating no right, cannot be made *actionable* on the ground of the motive which induced it. Such was the case of *South Royalton Bank vs. Suffolk Bank*, 27 Vt. 505. If the act is lawful, although it may be prejudicial, it is *damnum absque injuria*. On this point the case of *Mahan vs. Brown*, 13 Wend. 261, is a direct authority. There the defendant had built a high fence for the sole purpose of obstructing the lights of his neighbor's house; and it was held, that no action would lie, where the lights were not ancient, and no right had been acquired by grant or user; and that the motive with which the act was done was immaterial. This case goes upon the ground, that the plaintiff was not injured in a legal right.

This is not like the case where the air is contaminated so as to become noxious. There a *correlative* right is invaded. In the case of *Greenleaf vs. Francis*, 18 Pick. 117, it is true, the court charged the jury that if the defendant dug the well where he did, upon his own land, for the purpose of injuring the plaintiff, and not for the purpose of obtaining the water for his own use, the defendant was liable in that action. In that case, the verdict was for the defendant, and the plaintiff was the excepting party. The plaintiff could not complain of that part of the charge; and, in banc, there was no occasion to review that part of it; and it is no point in the decision, though Judge Putnam does remark, in the course of his opinion, that "the rights of the defendant should not be exercised from

mere malice, as the judge ruled, below," but no such point was in judgment. The exceptions came from the plaintiff, and it can only be regarded as an *obiter dictum* of the judge; the case found, that the defendant had dug his well in that place on his land, where it was most convenient for him; and we think, as applied to a case like the one then at bar and the one now before us, the position was unsound, and against principle and authority.

Judgment of the County Court reversed, and the cause remanded.

RECENT ENGLISH DECISIONS.

In the Court of Queen's Bench.

REG. vs. MARIA CLARKE IN RE ALICIA RACE.¹

An infant of the age of ten years was brought up on habeas corpus upon the application of the mother who was surviving parent, the father who was a marine, having died without appointing a guardian. The object of the mother, who was a Roman Catholic, was to remove the infant from a school under the Commissioners of the Royal Patriotic Fund, at which she had placed her in 1855, and to have her educated in a Roman Catholic school. *Held*, that the mother as guardian for nurture, was entitled to the custody of the person of the child; that the court could not examine the infant as to her wishes or religious belief; that the mother was not bound to educate her in the Protestant faith, nor had she lost her right over her by committing her to the care of the Commissioners of the Royal Patriotic Fund; and therefore the court was bound to order her to be delivered to her mother.

*January 17.*²—A writ of habeas corpus had been issued directed to Maria Clarke, the matron of the Sailor's Orphan Girl's School at Hampstead, to bring up the body of Alicia Race. The return by the matron stated that Alicia Race had been placed in the school by the Commissioners of the Royal Patriotic Fund; that she had not detained and did not detain her against her will, but that Alicia Race had continued with her, at her own desire.

¹ 21 Jurist, 835.

² Before Lord Campbell, C. J., Wightman and Crompton, JJ. Coleridge, J., was in the Court of Criminal Appeals.

Shee, Serjeant, moved that Alicia Race should be delivered to the mother.

O'Malley, contra.—The court will leave the child to choose for herself.

Bovill, for the Commissioners of the Patriotic Fund.—The court will not force the child to go to its mother.

It appeared that the mother, Alicia Race, was the widow of Lauman Race, late a Sergeant of Marines on board her Majesty's ship *Pique*, who was killed at the attack upon Petropaulovski, in September, 1854, and that she had by him two children, John, aged about twelve years, and the said Alicia, aged ten years and a-half. In July, 1855, she sent her daughter to the Sailor's Orphan Girl's School, which was under the control of the Commissioners of the Royal Patriotic Fund, and in which she would be maintained, clothed and educated, until she was fit for a situation, and then would be fitted out for it. The boy had been, with her concurrence, placed in the Sailor's Orphan Boy's School at Chardstock, in Dorsetshire, also supported out of the Patriotic Fund; but on the 25th October, 1856, she removed him, and was now desirous to remove her daughter from the Sailor's Orphan Girl's School, for the purpose of having her educated in a Roman Catholic School. The father was a member of the Church of England, and the mother a Roman Catholic; and during his lifetime she had with his consent, given their children such religious instruction as was in accordance with her own religious profession, and taught them to say Roman Catholic prayers; but the father attended the service of the Church of England, and during the time he was stationed at Chatham the children attended the regimental schools, which were conducted on Protestant principles; and they had been baptized by a clergyman of the Church of England. The father, by his will, dated the 24th August, 1854, after bequeathing all his property to his wife, directed that his Bible and papers should be sent to her; and the will concluded with the following clause:—"I do hereby nominate, constitute, and appoint my wife, Alicia Race, executor of this my will and testament, feeling confident that she will do justice to my dear

children as a wife and mother." On the next day he wrote the following letter to his wife :

"Her Majesty's ship Pique at Sea,
August 25, 1854.

"My dear wife and children :—I now sit down to write a few lines to you previous to going into action. When you receive this I shall be no more, as it will not be sent to you if I survive. I hope you are all quite well, as I am at the present time. My dears, I write to bid you an eternal farewell, if such is God's will that I am to be cut off; but I trust in Providence, and hope I may be spared to meet you again; but as we cannot all expect to survive to tell the tale, and I may be one that is doomed to die in defence of my Queen and country, therefore, my dear wife, it will be a consolation that I died in defence of liberty and done my best, as in duty bound by my oath when I took to the profession of arms. My dear Alicia, I have made my will to you, and I trust you will carry it out according to my wish. I wish, my dear, that you will remain a widow until the children are capable of taking care of themselves. I hope, my dear, that you will not disregard this my last wish, as I should not die happy if I thought a step-father would be over my babes; but I feel confident that you will not forget my last wish. My dear wife, I have not received a letter from you, or any one else, since I left England. I should feel very happy to hear from you before I am called into eternity; but the Lord's will be done. We must bow to His command. My dear Ally, I am but ill-prepared to meet my Maker face to face, but I trust he will have mercy upon my poor soul, and forgive me my transgressions, as I forgive all men that have done me any wrong, before I die. I have settled all my worldly affairs as well as I can. My dear wife, kiss my dear children for me, as a last embrace from a loving father, and tell them that his last thoughts were for them, and bring them up in the fear of the Lord. My dear wife, I think I see poor Alicia, by turns, for the loss of her poor old man, and then I see her rejoicing at his return; but, alas, such dreams! My dear, I have written a farewell letter to my mother, brothers, and sisters, and all friends and

relations, and I trust you will not be forgotten by them. My dearest wife, give my dying love to your mother and sister, and all your friends that may befriend you or my dear children. May we all meet in heaven, is the last prayer of one that you know how to prize, although he will be in eternity when you receive this last letter he ever wrote, as we are only waiting for the morning to dawn to go into Petropaulovski and commence the work of destruction. It is a Russian colony, and we are bound to take it, or die in the attempt. My dear wife and children, it is late, and I require some rest before I commence the work of carnage that to-morrow may bring forth. My dear, I have not set my foot on shore but twice since I left England, and then only for a few hours, on duty. The last from your affectionate, loving husband,

LAUMAN RACE."

The girl had expressed a strong disinclination, on religious grounds, to leave the Sailor's Orphan Girl's School, and the committee of the school had declined to compel her to leave and return to her mother.

Shee, Serjt., and *Finlason*, besides the cases mentioned in the judgment, cited *Mendes vs. Mendes*, 1 Ves. sen. 89; 3 Atk. 619; *Ex parte Hopkins*, 3 P. Wms. 152; Jervis, C. J., in *re Hakewill*, 12 C. B. 223, 230; Lord Cottenham in *Warde vs. Warde*, 2 Ph. 786; Forsyth on the Law of Infants, 72, citing *Rex vs. Isley*, 5 Ad. & El. 441; 6 Nev. & M. 730; Id. 76, citing *Rex vs. Soper*, 5 T. R. 278; M'Pherson on Infants, 135-141; 2 Stephen's Commentaries, 292, 2d ed.; *Rex vs. Ward*, 1 W. Bl. 386; and an *Anonymous case*, before Lord Eldon, cited in *Lyons vs. Blenkin*, 1 Jac. 254, note b.

O'Malley and *Lush* showed cause. They referred to stat. 12 Car. 2, c. 24, s. 9, which enables the father to appoint a testamentary guardian of his child under the age of twenty-one years; 4 Bac. Ab., "Guardian," F., citing *Lord Anglesey vs. Lord Ossory*, 3 Keb. 528; Id., "Infancy," A.; Id., "Habeas Corpus," B., 139; and Lord Mansfield in *Rex vs. Delaval*, 3 Burr. 1434, 1436.

Bovill, for the Commissioners of the Patriotic Fund, referred to *In re Arabella Frances North*, 11 Jur. 7, and stated the objections

which the commissioners felt to the removal of the child from the school, and contended that the child ought to be educated in the religion of its father, according to the rule which was followed in schools belonging to Chelsea and Greenwich Hospitals.

Shee, Serjt., in reply, cited *Hall vs. Hall*, 3 Atk. 721; and Littledale, J., in *Ex parte Glover*, 4 Dowl. 291.

Cur. adv. vult.

Lord CAMPBELL, C. J. now delivered the judgment of the court.

In this case we are to determine what directions ought to be given by the court respecting Alicia Race, an infant of the age of ten years and a few months, brought up under a writ of habeas corpus, granted at the instance of her mother. On the one side it is contended that we ought at once to order the child to be delivered to the mother; and on the other, that we should ask the child to make her election whether to go home with her mother, or to return to the school from which her mother wishes to remove her.

It is not disputed, that the father being dead without appointing a guardian, the mother is now guardian for nurture; and it is laid down in 3 Rep. 38 b., that guardianship for nurture continues till the child attains the age of fourteen years.¹ An observation was made that the commissioners of the school are in loco parentis; but this was little relied upon, and is wholly untenable. As a general rule, it is admitted that if a child under the age of seven years is so brought up, the court ought at once to order the child to be delivered to the guardian. But the contention is that between the ages of seven and fourteen the court ought to examine the child, and ascertain whether it has mental capacity to be competent to make a choice; and, according to the degree of mental capacity which it is found to possess, to hand it over to the guardian, or to liberate it, and to desire it to go where it pleases.

With regard to the maintenance of the poor, a rule has been introduced, that while a child is under seven it shall not be separated

¹ Br. Ab., "Garde," pl. 86, 101, 111, and Hale's P. C. 26, were also cited in argument.

from the mother for the purpose of being maintained by the parish in which it is settled. Again: by Serjeant Talfourd's Act, 2 and 8 Vict. c. 54, s. 1, it is enacted, that where infants under the age of seven years are in the sole custody or control of the father, the Lord Chancellor or the master of the Rolls may make an order that such infants shall be delivered to and remain in the custody of the mother until they attain the age of seven years.

Under seven is called the "age of nurture;" but this is the peculiar nurture required by a child from its mother, and is entirely different from guardianship for nurture, which belongs to the father in his lifetime, even from the birth of the child. We can find no distinction in the books as to the rights and incidents of this species of guardianship from the time when it commences till the time when it expires. One of these incidents is, that the guardian shall be entitled to the custody of the person of the child. Without such right he could not possibly perform the duties cast upon him as guardian. He is to nurture the child: the legal sense of this word is its natural and common sense in the English language, which Dr. Johnson says is, "to educate, to train, to bring up." Accordingly, from the case to be found in the Year Book, 8 Edw. 4, 7 b, to the present time, it has ever been considered that the father, or whosoever else on his death may be the guardian for nurture, has by law a right to the custody of the child, and shall maintain an action of trespass against a stranger who takes the child. See the authorities, Com. Dig., "Guardian," D.

The question then arises, whether a habeas corpus be the proper remedy for the guardian to recover the custody of the child of which he has been improperly deprived. Certainly, the great use of this writ—the boast of English jurisprudence—is to set at liberty any of the Queen's subjects unlawfully imprisoned; and when an adult is brought up under a habeas corpus, and found to be unlawfully imprisoned, he is to have his unfettered choice to go where he pleases. But with respect to a child under guardianship for nurture, the child is supposed to be unlawfully imprisoned when unlawfully detained from the custody of the guardian; and when delivered to him the child is supposed to be set at liberty. *Rex vs. De Mandeville*,

5 East. 220, clearly proves that such is the fit mode of proceeding if the child is under seven. Is there any reason for following a different course between seven and fourteen? The intellectual faculties of the child may be considerably developed in this interval, and the child may now have a very strong inclination to leave the home of the guardian, and from religious as well as frivolous motives, to be educated at a different school from that which the guardian has selected. But the consequences which would follow from allowing such a choice, are most alarming. We must lay down a rule which will be generally beneficial, although it may operate harshly in particular instances. If the proposed choice were given to the child, the relation of guardian and ward would still subsist; the guardian might retake the child wherever he finds it, and he might maintain an action against the person who, contrary to his wishes, takes or detains the child. Then how could nurture be carried on with such a doctrine, which, if established, would apply to every father of a family in the kingdom, in respect of all his children, male and female, above the age of seven years? If a father wishes to take his son, when ten years old, from a private school where flogging is not practiced, and send him to Eton, and the boy refuses to come home, and is brought up by habeas corpus, is he to be permitted to say that on consideration, he is of opinion that the private school is preferable to any public school where flogging is permitted, and therefore he makes his choice to return to the private school, the master being willing to receive him? Or suppose that a Protestant mother, guardian for nurture of a daughter seven years of age, sends her to a boarding school professing to be a Protestant seminary; in a short time she finds that attempts have been successfully made by teachers there to convert the girl to the Roman Catholic faith; the girl refuses to come home, saying, in analogy to the language used by Alicia Race, "I will not go home to my own mother; I will stay here, where I may pray to the mother of God." She is in consequence, brought up by habeas corpus. Are we to examine her, and, finding her of quick parts, and professing to be a sincere convert to the Roman Catholic faith, to tell her, that in spite of the wishes of her mother, she is at liberty to return to the school where

she has been converted? Such a doctrine seems wholly inconsistent with parental authority, which both reason and revelation teach us to respect as essential for the welfare of the human race. Indeed, allusions were made during the argument at the bar to the workings of prevenient grace, and to the words of our Lord, "Suffer little children, and forbid them not, to come unto me, for of such is the kingdom of heaven." It must be enough merely to say, that the parental authority is in no degree weakened by such sacred doctrines or precepts; for it is impossible, without irreverence, to show how irrelevant they are. This suggests the extreme inconvenience which would arise from the proposed examination of the child. If there is to be an examination, it ought to be conducted before all the judges who are to take part in the adjudication; and, after testing her mental acumen, we ought to ascertain whether it is upon due investigation that she has imbibed a preference to Protestantism, and such an aversion to the Roman Catholic faith.

When we look into our law books, although we do not find the exact age defined within which the court, on a habeas corpus, will order the child to be delivered up to the parent or guardian without examination, we do find cases where this course has been adopted, the child being above seven years of age; and we find nothing to indicate that the rights of guardian for nurture are in any respect impaired during the period of guardianship. In *Rex vs. Johnson*, (1 Str. 579; 2 Ld. Raym. 1333; S. C., Mod. 214,) a female child, nine years old, was brought up by habeas corpus in the custody of her nurse, having a testamentary guardian appointed by the father. The court at first doubted whether they should go any further than to see that the child was not under any illegal restraint, but afterwards declared, that this being the case of a young child, who had no judgment of her own, they ought to deliver her to her guardian, although she was very unwilling to be taken from Mrs. Johnson, her nurse, who was her near relation, and had cared for her very tenderly and disinterestedly. It was afterwards said, in 2 Str. 982, that Lord Raymond, who had been a party to this judgment, repented of what he had done; but in his own report of the case he throws no discredit upon it; and Lord Mansfield afterwards ex-

pressed strong approbation of the case, and said, that if Lord Raymond had changed his mind, his first judgment was clearly the right one. (*Rex vs. Delaval*, 1 W. Bl. 413). It is necessary to travel through the cases seriatim, as they are all reviewed in *Rex vs. Greenhill*, (4 Ad. & El. 624; 6 Nev. & M. 244), where the court laid down the rule, that where a young person under twenty-one years of age is brought before the court by habeas corpus, if he be of an age to exercise a choice, the court leaves the infant to elect where he will go; but if he be not of that age, the court must make an order for his being placed in the proper custody. Lord Denman, Littledale, Williams, and Coleridge, JJ., all make age the criterion, and not mental capacity, to be ascertained by examination. They certainly do not expressly specify the age, but they cannot refer to seven as the criterion, and there is no intervening age making the rights or responsibility of an infant till fourteen, when guardianship for nurture ceases, upon the supposition that the infant has now reached the years of discretion.

When we attend to the authorities cited by the counsel for the commissioners, we find some vague dicta, and even some decisions, which at first sight give a color to the doctrine of examination and choice under fourteen, but which admit of an explanation entirely consistent with the claim of the guardian. In *Rex vs. Smith*, (2 Str. 982), *Rex vs. Johnson*, (1 Str. 579), is said to have been overruled, because a boy, who had not completed his fourteenth year, being brought up by habeas corpus, at the suit of the father, from the custody of an aunt, with whom he wished to live, was set at liberty, instead of being delivered up to his father, and was allowed to return to his aunt. But Lord Mansfield, in commenting upon this case, gives the true ratio decidendi upon which, and upon which alone, it can be supported—"That case was determined right, for the court was certainly right in refusing the infant to the father, of whose design in applying for the custody of his child they had a bad opinion." (*Rex vs. Delaval*, 3 Burr. 1437). There is an admitted qualification on the right of the father or guardian, if he be grossly immoral, or if he wishes to have the child for any unlawful purpose. The counsel for the commissioners relied much upon the

case of *Anne Lloyd*, (3 Man. & G. 547; 4 Scott's N. R. 200), where the mother of an illegitimate child, between eleven and twelve years of age, having obtained a habeas corpus directed to the putative father to bring it up, the court refused to order it to be delivered to the mother, and declared that it might use its own discretion; and the child being unwilling to go with the mother, the court would not allow the mother to take it by force. But Maule, J., there asked, (3 Man. & G. 548), "How does the mother of an illegitimate child differ from a stranger?" And although the relation of the mother to her illegitimate child is recognized for some purposes, it is clear that she has over it all the rights of guardian for nurture. From what was said by Lord Ellenborough in *Rex vs. Hopkins*, (7 East, 578), it would appear that it is only while an illegitimate child is under seven—an age during which the law of nature and the law of the land both say that the child, whether legitimate or illegitimate, ought not to be separated from the mother—that the court will interfere to protect the custody of the mother. In *Anne Lloyd's case* the child was considerably above that age. The only other decision much relied upon as to the right of the parent or guardian on a habeas corpus was *In re Preston*, (5 Dowl. & L. 233; 11 Jur. 1039), where a most distinguished judge refused to grant a writ of habeas corpus to bring up a legitimate child above the age of seven on the alleged application of the mother, who had become guardian for nurture, the father being dead. But the application was made under a power of attorney, the mother remaining in the East Indies, so that the child could not have been delivered to her. The real opinion of my Brother Patteson upon this subject we have fortunately an opportunity of knowing, from a note of Sir Erskine Perry, late Chief Justice of Bombay, in a very interesting collection of "Oriental Cases" decided and published by him. A Parsee family having detained an infant child from its father, a Parsee, on the ground that the father had embraced the Christian religion; on a habeas corpus the court had ordered the child to be given up to the father. In another case, the court, on habeas corpus, had ordered an Hindoo boy of twelve years of age, who professed to have embraced Christianity, to be delivered up to his father, who

adhered to the Hindoo religion, and the judges refused to examine the boy as to his capacity and knowledge of the Christian religion. In similar cases the Supreme Court at Calcutta had followed a different course. There being no appeal in such matters to a higher court, Sir Erskine Perry, for his subsequent guidance, very properly submitted the question to my Brother Patteson, whose reponse was as follows:—"I cannot doubt that you were quite right in holding that the father was entitled to the custody of his child, and enforcing it by writ of habeas corpus. The general law is clearly so, and even after the age of fourteen; whereas the boy was only twelve. The right might, indeed, be forfeited by misconduct of a very gross nature; but nothing of that kind appears to have been brought forward. It may have been an act of imprudence originally in the father to place his boys with persons who were likely to bring them up in religious opinions and faith contrary to their father. I suppose he made some stipulation for avoiding this; but whether he did or not, I do not think that the law would be affected thereby. Even if he had changed his mind on that subject, as well as on the education of his boys in other respects, I know of no law which forbids him to do so, or binds him to the arrangement which he had at first made." (Oriental Cases, 109).

For these reasons and on these authorities we are of opinion, in the present case, that *primâ facie* the mother is entitled, as guardian for nurture, to have her child delivered over to her. Still she may have forfeited her right by prior immoral conduct, or by proof that she does not make the application *bonâ fide*, or by having some illegal act in view when she has obtained possession of the child. According to the case of *Rex vs. Greenhill*, (4 Ad. & El. 624; 6 Nev. & M. 244), the immorality, to extinguish the right of the parent or guardian to the custody of the child, must be of a gross nature; so that the child would be in serious danger of contamination by living with him. But here no immorality whatever is imputed to Mrs. Race, and she seems to have been a virtuous woman, well deserving the ardent affection which her husband felt for her. An attempt is made to show, that in applying for this writ she is a mere tool in the hands of others. But, on carefully looking through the

affidavits, we do not see that this charge is at all substantiated, and we think that we are bound to give credit to what she swears as to the purity and sincerity of her motives. In wishing to take her two children from these Protestant schools she may act conscientiously, although not prudently; and when the boy was allowed to go, she might not unnaturally desire to have the girl also, that they might be educated together.

The answer to this application (if there be any) we think must rest upon the ground that the mother was under a legal obligation to educate her children in the Protestant faith, and that she now seeks to get possession of her daughter with the intention of following a course with her which the law forbids. Had she been a testamentary guardian, and the will had directed that the children should be educated as Protestants, we should not have ordered the girl to be delivered up to the guardian, she intending to send the girl to a Roman Catholic seminary. But she is guardian for nurture, with all the rights belonging to a mother as surviving parent. The husband certainly was a Protestant; his children had been baptized in the Anglican Church, and he probably expected that they would be brought up as Protestants, but his will is entirely silent upon this subject; and in his most beautiful and affecting letter of the 25th August, 1854, (showing him to have been the model of a Christian soldier), he appears to have had unbounded confidence in her, and to have left the education of the children entirely to her discretion. Indeed, by marrying a Roman Catholic, and by permitting the children in his lifetime to join in Roman Catholic prayers, he does not seem to have had the horror of Popery felt by many pious Protestants. Still, if the proposition laid down can be supported, that it was her duty, as guardian for nurture, from the simple fact of the father having been a Protestant, to educate the children as Protestants, she would be contemplating what the law forbids, by wishing to remove the children from a Protestant to a Roman Catholic school. But no sufficient authority has been cited in support of this proposition; and the mother becoming guardian by nature on the death of the father, no provision to the contrary being made by the will, she appears to us to have in all respects the same

parental authority which might have been exercised by the father had he survived the mother.

As the law stands, since the repeal of the statutes for persecuting Papists, the question must be the same, under the actual circumstances of this case, as if the father had died a Roman Catholic, and the mother surviving had been a Protestant. Would it in that case have been unlawful for the mother to have brought up the children as Protestants? The case of *Villareal vs. Mellish*, (2 Swanst. 533¹) and *Talbot vs. The Earl of Shrewsbury*, (4 My. & C. 672), show that in such matters the courts know of no distinction between different religions, and will not interfere with the discretion of guardians as to the faith in which they educate their wards. The authority relied upon to show that the ward must invariably be educated in the religion of the father is *In re Arabella Frances North*, before Sir J. L. Knight Bruce, V. C., (11 Jur. 7). That case arising jointly on a return to a habeas corpus, and on a petition for the appointment of a guardian to children as wards of the Court of Chancery, it is difficult to distinguish what was done or said by the Vice-Chancellor as a common-law and as an equity judge. He cannot be alleged to have decided anything upon this point, and he had only to consider it with a view of determining whether the children should for a few days, till a guardian was appointed, be in the custody of a Roman Catholic or of a Protestant nurse. He certainly does draw an inference of fact, that the father died a Protestant, although for some time before his death he had conformed to the worship of the Roman Catholic Church, and, when dying, he would not permit the ministration of a Protestant clergyman; and his Honor does express an opinion, that although the wife had been formally admitted into the Roman Catholic Church, the children must be educated in the Protestant faith, the father having given no directions upon the subject by will. But this doctrine, if well founded, would only apply to the education of wards of the Court of Chancery, respecting whom an equity judge, representing the Queen as *parens patriæ*, has a very large discretion, and may give directions beyond the scope of the duties of a

¹S. C., 2 Atk. 14.

guardian for nurture under the common law. Therefore, without venturing to question the dictum of so eminent a judge, (although it seems not altogether to accord with what was said by Lord Cottingham in *Talbot vs. The Earl of Shrewsbury*, 4 My. & C., 672), we do not think it enough to show that the mother of this infant, as guardian for nurture, was equally bound to educate the children as Protestants, or that she can be charged with an illegal purpose when intending to send them to a Roman Catholic school.

The commissioners, in detaining this girl from her mother, have no doubt acted from the most laudable motives; but they are wrong in point of law in supposing that the mother, by committing the child to their care to be educated, has lost all right over her. In the case cited from the Year Books, (8 Edw. 4, 7 b), it was held, that "if a guardian, by reason of nurture, delivers the infant to another for instruction, he may afterwards retake the infant;" and this is vouched for good law by Comyns, C. B., in his Digest, tit. "Guardian," D. It might be every way much better for this child to remain in the school at Hampstead, which appears to be in all respects so admirably conducted, and we may individually deplore her removal from it; but upon this matter, as there is nothing contrary to law in contemplation, we have no jurisdiction to determine; and we think that we are bound, in the discharge of our judicial duty, to order that the infant Alicia Race be delivered up to her mother. We trust that she will ever be treated by her mother with the affection and tenderness anticipated by her father in the letter which he wrote when he foresaw that he was soon to fall in defence of his country.

O'Malley applied to the court that the judgment might not be immediately executed, upon an affidavit, which stated that on the 20th January a bill had been filed, at the instance of the committee of the Sailors' Orphan Girls' School, making Alicia Race a ward of Chancery; and that application would be made to Sir R. T. Kindersley, V. C., at the sitting of his court this day, for an injunction restraining the mother from interfering with the education of her daughter, and further proceeding under the writ of habeas corpus granted by this court, or from acting under any order made thereupon.

Lord CAMPBELL, C. J.—It is my opinion that the order of this court ought to be immediately executed. We have done our duty; the Vice-Chancellor will do his.

O'Malley stated that he was informed that an injunction had been granted.

Lord CAMPBELL, C. J.—We can take no notice of the injunction. The order of this court must be obeyed.—*Order accordingly.*¹

In the Court of the Queen's Bench, January, 1857.

HUMFREY vs. DALE AND OTHERS.²

1. T. & M., brokers, employed by H. sold on his account to D., M. & Co., who were also brokers, ten tons of linseed oil. On the 14th of August, 1855, the following sold note was sent by T. & M. to H:—

“Sold to Dale, Morgan & Co., for account of Mr. Charles Humfrey, ten tons of linseed oil, of merchantable quality, at, &c. (stating the terms.)

“THOMAS & MOORE, Brokers.

“Quarter per cent. brokerage to D., M. & Co., and a half to us.”

On the same day the following bought note was sent by D., M. & Co. to T. & M:—

“Sold this day for Messrs. Thomas & Moore, to our principals, ten tons of linseed oil, of merchantable quality, at, &c. (stating the same terms.)

DALE, MORGAN & Co., Brokers.

“Quarter per cent. to D., M. & Co.”

2. D., M. & Co. afterwards declined to accept the oil; and on the 28th of February, 1856, they informed H. of the name of their principal for whom they had purchased.
3. H. afterwards brought an action against D., M. & Co. for the price of the oil, and at the trial parol evidence was admitted of a usage of trade in the city of London, by which a broker making such a contract was held personally liable as purchaser, if he did not at the time of the contract disclose the name of his principal:—Held, first, that there was clear evidence of a contract of bargain and sale between the plaintiff as seller and the undisclosed principal of the defendants.
4. Secondly, that the evidence of the usage of trade, whether treated as explain-

¹ Sir R. T. Kindersley, V. C., subsequently, with the consent of the parties, heard the case in private, and delivered a judgment directing the education of the child in the religion of the father.

² 26 L. Jour. Rep. 137, Q. B.

ing the language of the written contract, or adding to it a tacitly implied incident, was properly admissible, and rendered the defendants themselves liable under the contract.

This was an action for the price of a quantity of linseed oil, bargained and sold by the plaintiff to the defendants, and not accepted by them.

Plea, denying the alleged bargain and sale.

At the trial, before Coleridge, J., at the Sittings in London, during Easter term, 1856, it appeared that the plaintiff, in August, 1855, directed his brokers, Messrs. Thomas & Moore, to sell, on his account, ten tons of linseed oil, to be delivered during the last fourteen days of February, 1856. Soon afterwards they informed the plaintiff of the sale of the oil, and handed to him the following note:—

“London, August 14, 1855.

“Sold to Dale, Morgan & Co., for account of Mr. Charles Humfrey, ten tons of linseed oil, of merchantable quality, at £44 per ton, real tare and usual draft, to be free delivered during the last fourteen days of February next, and paid for in ready money, allowing £2 10s. per cent. discount.

“THOMAS & MOORE, Brokers.

“Quarter per cent. brokerage to D., M. & Co., and a half to us.”

On the same day, the defendants sent to Thomas & Moore the following note:—

*“75, Old Broad street, London,
August 14, 1855.*

“Sold this day for Messrs. Thomas & Moore, to our principals, ten tons of linseed oil, of merchantable quality, at £44 per ton, real tare and usual draft, to be free delivered during the last fourteen days of February next, and paid for in ready money, allowing £2 10s. per cent. discount.

DALE, MORGAN & Co., Brokers.

“Quarter per cent. brokerage to D., M. & Co.”

Thomas & Moore made an entry of the contract in their books, but they did not send to the plaintiff any note corresponding with that sent to them by the defendants. On the 27th of February, 1856, the defendants declined to accept the oil, stating that they had made no contract with the plaintiff for the purchase of it, and on the 28th of February they informed the plaintiff that Mr. William Shenk was their principal, for whom the purchase of the oil had been made. Shenk had become bankrupt on the 2nd of February.

It was proved to be of everyday occurrence for brokers not to disclose the names of their principal, and parol evidence was admitted of a custom in the city of London, in the case of contracts between brokers in the Baltic trade, that if the brokers did not, at the time of the contract, disclose the names of their principals, the contract was termed a close contract, and the brokers themselves were responsible for the completion of the contract to the seller or buyer, as the case might be. It also appeared, that it was not usual for the selling broker to do more than send a sold note to his principal, when the buying broker sends in a bought note, as in the present case. A verdict was, by direction of the learned judge, found for the plaintiff for the sum claimed; leave being reserved to the defendants to move to set the verdict aside, and enter a nonsuit.

A rule *nisi* for this purpose was afterwards obtained on the grounds, first, that there was no evidence of the alleged contract; and, secondly, that the evidence of the custom was not admissible.

Pigott and Kemplay showed cause (Nov. 4.)—The contract of sale was between the plaintiff and the defendants, so as to make the defendants liable. It is evidenced by two documents: first, the sold note, sent by the defendants to Thomas & Moore, as the plaintiff's agents; that, alone, shows a contract upon which the defendants are liable, at all events, as the agents of an undisclosed principal. Story on Agency, 228, 229. *Thomson vs. Davenport*¹ shows that a party may look either to the agent or to the undis-

¹ 2 Smith's Lead. Cas. 219.

closed principal when discovered. But, secondly, the note entered in the brokers' book shows that the contract was considered at the time as upon a purchase by the defendants of the plaintiff. On one or both, therefore, there is evidence of a contract of sale between the plaintiff and the defendants.

[WIGHTMAN, J.—*Paterson vs. Gandasequi*¹ shows that the liability of the agent is not confined to the case of a foreign principal.]

*Pennell vs. Alexander*² is an authority showing that Thomas & Moore might consider the sold note as an authority to treat the defendants as principals. But, further, the plaintiff is at liberty to resort, if necessary, to the parol evidence of the custom. The effect is not in any way to vary the terms of the written contract. In the notes to *Thompson vs. Davenport* the authorities are collected and commented upon which establish that parol evidence is admissible to charge, but not to discharge, a party to the contract. Here it is used for the purpose of charging a party as principal. In *Trueman vs. Loder*³ parol evidence tendered was held inadmissible, as it went to discharge the real party to the contract. That case is clearly distinguishable from the present. Upon the same principle the cases of *Magee vs. Atkinson*,⁴ *Higgins vs. Senior*,⁵ *Carr vs. Jackson*⁶ and *Schmalz vs. Avery*,⁷ are authorities to support the admissibility of the evidence.

Manisty, in support of the rule.—There is no evidence of any binding contract; but if evidence of any contract, it is, even if the parol evidence be admitted, of a contract between Thomas & Moore and the defendants, and not between the plaintiff and the defendants. The sold note shows that the defendants had sold for Thomas & Moore to their principals, which means principals, if the defend-

¹ 15 East, 61.

² 3 El. & B. 283; s. c. 23 Law J. Rep. (N. S.) Q. B. 171.

³ 11 Ad. & E. 599; s. c. 9 Law J. Rep. (N. S.) Q. B. 165.

⁴ 2 Mee. & W. 440; s. c. 6 Law J. Rep. (N. S.) Exch. 115.

⁵ 8 Ibid. 834; s. c. 11 Law J. Rep. (N. S.) Exch. 109.

⁶ 7 Exch. Rep. 382; s. c. Law J. Rep. (N. S.) Exch. 137.

⁷ 16 Q. B. Rep. 655; s. c. 20 Law J. Rep. (N. S.) Q. B. 228.

ants have such. The entry in the brokers' book, not communicated to the defendants, cannot alter the contract, and Thomas & Moore ought to have been the plaintiffs. If once there is an election to deal with a broker as principal, the parties cannot afterwards alter the liability upon the contract. In *Thompson vs. Davenport*, and that class of cases, the agent acted either for a foreign or an undisclosed principal, and goods being delivered to an agent, he was sued as a principal, not having disclosed his principal. Here the principal was disclosed before action was brought. The written document itself then not disclosing the evidence of the contract, recourse is sought to be had to parol evidence, to show that a different meaning is to be given to the language of the document; but that, it is submitted, cannot be done.

Cur. adv. vult.

The judgment of the court¹ was now delivered by

LORD CAMPBELL, C. J.—This was a rule to enter a nonsuit, and the facts upon which the question to be decided arises, appear to be the following:—The action was for the price of linseed oil alleged to be bargained and sold by the plaintiff to the defendants, and not accepted by them. The plea denied the bargain and sale. The plaintiff had employed Thomas & Moore, brokers, to sell the oil for them. One Shenk was a buyer of oils, and had employed the defendants, who were brokers, to buy for him. The dealing in question was between the brokers, and after proof of the facts now stated, in order to prove the specific contract, the plaintiff put in two notes—[His Lordship read the notes above set out.] And the plaintiff further gave in evidence, without objection, that according to the usage of the trade, whenever a broker purchased without disclosing the name of his principal, he was liable to be looked to as the purchaser. In this case the defendants had not disclosed their principal's name till an unreasonable time after the contract made, and when he had become insolvent. It was then objected that, upon this state of facts, there was no evidence of any contract, but if of any, that it was of a contract between Thomas &

¹ Lord Campbell, C. J., Coleridge, J., Wightman, J. and Erle, J.

Moore and the defendants, not of a contract between the plaintiff and them. And upon the argument the admissibility of the evidence of usage was debated, upon which, therefore, it will be necessary for us to express our opinion.

Upon consideration, we think that there is no foundation for either objection. Parol evidence was clearly admissible to show the circumstances under which the contract was made, and the relation of the plaintiff and the defendants to it, and to each other in respect of it. It was shown, then, without the help of usage, that the plaintiff was the owner of the oil, and that Thomas & Moore were employed by him to sell it. By the note first stated the defendants signing as brokers say *they have sold* for Thomas & Moore to their own principal, whom they do not name, but for whom they by necessary implication say that they have bought. It cannot be doubted that although they say in the note that they have sold for Thomas & Moore, the plaintiff might show that Thomas & Moore were only his agents, and that he was, in fact, the principal for whom the defendants sold, and with whom, if with any one, as the seller, the contract was made. But the defendants also state that they have bought, for they say they have sold to a person who is their principal, which must mean their principal as buyer in that transaction. Whether they had authority from him so as to bind him by their signature, is not now the question as against him, but as against themselves, and they cannot deny that they have made such purchase as they themselves state. We have, then, as the case now stands, clear evidence of a contract or bargain and sale between the plaintiff as the seller and the undisclosed principal of the defendants. The only remaining question is, having stated a purchase for a third person as principal, is there evidence on which they themselves can be made liable? Now, neither collateral evidence, nor the evidence of a usage of trade, is receivable to prove anything which contradicts the tenor of a written contract, but, subject to this condition, both may be received for certain purposes. To use the language of Mr. Phillips (Vol. 2, p. 415, 10th ed.,) "Evidence of usage has been admitted as to contracts relating to transactions of commerce, trade, farming or other business, for the pur-

pose of defining what would otherwise be indefinite, or to interpret a peculiar term, or to explain what was obscure, or to ascertain what was equivocal, or to annex particulars and incidents which, although not mentioned in the contracts, were connected with them or with the relations growing out of them, and the evidence in such cases is admitted with the view of giving effect, as far as can be done, to the presumed intention of the parties." Now, here, the plaintiff did not seek by the evidence of usage to contradict what the tenor of the note primarily imports, namely, that this was a contract which the defendants made as brokers. The evidence, indeed, is based on this ; the usage can have no operation except on the assumption of their having so acted, and of there having been a contract made with their principal ; but the plaintiff by the evidence seeks to show that according to the usage of the trade, and as those concerned in the trade understand the words used, they imported something more, namely, that if the buying broker did not disclose the name of his principal it might become a contract with him, if the seller pleased. Supposing this incident had been expressed on the face of the note, there would have been no objection to it as affecting the validity of the contract, for the effect of it would only have been that the sale might be treated by the vendor as a sale to the broker, unless he disclosed the name of his principal ; if he did, that it remained a sale to the principal, assuming, of course, the broker's authority to bind him. The case would then be analogous to that of the delivery of goods on a contract of " sale or return," where the goods pass only conditionally, that is, unless the buyer within the limit of a reasonable time, if none be limited, exercise the option of returning them : if he does, the contract falls to the ground, and is defeated as if it had never been ; if he does not, it takes effect from the time when it was made. Whether this evidence be treated as explaining the language used, or adding a tacitly implied incident to the contract beyond those which are expressed, is not material : in either point of view it will be admissible, unless it labors under the objection of introducing something repugnant to, or inconsistent with the tenor of the written instrument. And upon consideration of the sense in which that objection must

be understood with reference to this question, we think it does not. In a certain sense every material incident which is added to a written contract varies it, makes it different from what it appeared to be, and so far is inconsistent with it. If by the side of the written contract without, you write the same contract with, the added incident, the two would seem to import different obligations and be different contracts. To take a familiar instance, by way of illustration,—on the face of a bill of exchange at three months after date,—the acceptor would be taken to bind himself to the payment precisely at the end of the three months; but by the custom he is only bound to do so at the end of the days of grace, which vary according to the country in which the bill is made payable, from three up to fifteen. The truth is, that the principle on which the evidence is admissible is, that the parties have not set down on paper the whole of the contract in all its terms, but those only which were necessary to be determined in the particular case by specific agreement, and which, of course, might vary infinitely; leaving to implication and tacit understanding all those general and unvarying incidents, which a uniform usage would annex, and according to which they must in reason be understood to contract, unless they expressly exclude them. To fall within the exception, therefore, of repugnancy, the incident must be such as if expressed in the written contract would make it insensible or inconsistent: thus, to warrant bacon to be “prime singed,” adding “that is to say, slightly tainted”—*Yates vs. Pym*,¹ or to insure “all the boats of a ship,” and add “that is to say, all not slung on the quarter”—*Blackett vs. Royal Exchange Assurance*,² and other cases of the same sort scattered through the books, would be instances of contracts in which both the two parts could not have full effect given to them if written down; and, therefore, when one part only is expressed, it would be unreasonable to suppose that the parties intended to include the other also. Without repeating ourselves, it will be found that the same reasoning applies when the evidence is

¹ 6 Taunt. 446.

² 2 Cr. & J. 244; s. c. 1 Law J. Rep. Exch. 101.

used to explain a latent ambiguity of language. But here, if all that the plaintiff contends for had been expressed, the defendants would have contracted thus: "we buy for our principal, but if we do not disclose his name within a reasonable time we agree that you may treat us as the purchasers," and it cannot be said that the latter branch is inconsistent with the former, any more than the power to return, subject to which the goods pass, is inconsistent with their passing. There is a case of *Bywater vs. Richardson*,¹ which illustrates this. It was an action of deceit for the breach of a warranty of soundness in the sale of a horse; the warranty was in writing, absolute and unconditional in its form, and the horse was unsound; yet it was held an available defence to show that by a rule of the repository at which the horse was sold, known to the plaintiff, all warranties there given were to be in force only until twelve at noon on the day following the sale, unless meantime a notice of the unsoundness, with a certificate from a surgeon, was delivered at the office. Here, the rule known to the parties is exactly analogous to the usage of trade; the warranty did not in its terms import that it was binding for all time exclusively of the rule; it was not, therefore, inconsistent with those terms, to import a limitation of time, and by virtue of the rule it was held, that the parties had impliedly imported it. *Brown vs. Byrne*² has been so lately decided by us, and we there expressed ourselves so fully on this point, that we need do no more than refer to it. But our Brother Pigott in showing cause against the rule cited, for the purpose of distinguishing it, the case of *Truman vs. Loder*, and it is certainly a difficulty in his way—not as to the decision itself, which is quite consistent with our present observations, but in respect of a collateral matter there said to have been determined. That was an action for non-delivery of tallow; the sale was effected by a broker, one Woolner, acting for both parties, and signing both the bought and sold notes; in the former, the purchase was described to be for Truman & Cook, the plaintiffs, in the latter the sale was expressed to be for Mr. Edward Higginbotham to my principals, and the main struggle in the case

¹ 1 Ad. & E. 508; s. c. 3 Law J. Rep. K. B. 164.

² 3 El. & B. 708; s. c. 23 Law J. Rep. (N. S.) Q. B. 812.

was to make the defendant liable as trading under the name and through the instrumentality of Higginbotham, and there could be no doubt as to the soundness of the principle on which that might be done if the facts bore it out.

But in the judgment it is stated that the defendant on the trial sought to put this question, "whether it was not a custom in the tallow trade that under such contracts a party may reject the undisclosed principal and look to the broker for the completion of the contract," and that this question was not allowed to be put, which ruling the court confirmed. How this question could have any bearing on the matter in issue, where the contract apparently disclosed both principals, and where the plaintiff was seeking to enforce it against a disclosed principal (for such as to the present point Loder must be taken to have been under another name,) it is certainly difficult to see; and this difficulty is pointed out in the judgment. In it the same principle was admitted on which the plaintiff here rules; but it was thought in the application of that principle that the term in question sought to be annexed to the contract would be inconsistent with its tenor. We do not cite *Hodgson vs. Davies*,¹ as a legal decision to be opposed to this. Lord Denman dealt with it in the judgment in question, and shows how little it can be supposed to carry with it the weight of Lord Ellenborough's opinion. But we refer to it in connection with *Truman vs. Loder*, because, both cases, we think, disclose how entirely the minds of lawyers are under different influence from that which, in spite of them, will always influence the practice of traders, which practice creates the usages of trade. The former desire certainty, and would have a written contract express all its terms, and desire that no parol evidence beyond it should be receivable. But merchants and traders, with a multiplicity of transactions pressing upon them, and moving in a narrow circle and meeting each other daily, desire to write little, and leave unwritten what they take for granted in every contract. In spite of the lamentations of judges, they will continue to do so, and in a vast majority of cases, of which courts of law hear nothing, they do so without loss or inconvenience, and upon

¹ 2 Campb. 530.

the whole they find this mode of dealing advantageous, even at the risk of occasional litigation. It is the business of courts reasonably so to shape their rules of evidence as to make them suitable to the habits of mankind, and such as are not likely to exclude the actual facts of the dealings between parties when they are to determine on the controversies which grow out of them. It cannot be doubted in the present case, that *in fact* this contract was made with the usage understood to be a term in it; to exclude the usage is to exclude a material term of the contract, and must lead to an unjust decision. Of course this could be no occasion for a decision contrary to authority, but we think any one who reads the judgment of the court in *Truman vs. Loder* with attention will perceive how much it was influenced by a feeling of the supposed inconvenience of receiving any parol evidence in the case of a written contract, and as it was not necessary to the decision of the case then before the court, we are not bound by it now, and we did not hold ourselves bound by it in the case of *Brown vs. Byrne*, where it was brought to our notice.

For the reasons we have given we are of opinion that the evidence was receivable, and that the rule to enter a nonsuit should be discharged.

Rule discharged.

SHORT NOTES OF RECENT ENGLISH CASES.

BEING A SELECTION OF ADJUDGED POINTS.¹

In the Court of Chancery.

IN THE MATTER OF KELLERS, MINORS. 5 Ir. Ch. Rep., 328.

Guardian and Ward—Religious Education of Ward—Intention of Father.

As a general rule, the wishes of a father, either expressed or implied, as to the religious faith in which his children after his death are to be brought up, will be followed.—See *Talbot vs. Earl of Shrewsbury*, 4 My. & Cr. Re North, 11 Jur. 17. In the above-mentioned case of Kellers,

¹ From the London Law Magazine for May, 1857.

minors, this rule was acted upon under rather peculiar circumstances. The father was nominally a Roman Catholic, the mother a Protestant, and at the time of the marriage there was no agreement as to the religion in which the children of the marriage were to be educated. The children of the marriage were, it appeared, baptized by priests of the Roman Catholic persuasion, and entries of their births were made by the father in a Douay Bible. Ten of the persons who became sponsors for the children were Protestants, and three Roman Catholics. The children never, during the life of their father, attended Roman Catholic worship, except the eldest son, who upon one occasion only was taken by his father to see mass performed, on an occasion of great solemnity, and by way of spectacle. The father engaged a Protestant governess for the younger children, and placed his two eldest children, sons, at a Protestant school, where they received the usual elementary instruction in the Protestant religion, and with his knowledge and sanction attended a Protestant church. The father by his will appointed the mother testamentary guardian, who for several years after the father's death, until the two eldest children had attained the ages of eleven and ten, continued to bring them up in the faith of the Established Church. The mother having ceased to act as guardian, a guardian was appointed by the court to act in her place. It was held by the Master of the Rolls of Ireland, that the children ought to be brought up as Protestants. His Honor after referring to *in re Brown*, a minor 2 Ir. Ch. Rep., 151, and *Talbot vs. the Earl of Shrewsbury*, 4 M. & Cr., 672, and the principal facts of the case, made the following observations:—"No doubt a Roman Catholic father, appointing a Roman Catholic testamentary guardian, more distinctly indicates his wishes than a Roman Catholic father appointing a Protestant testamentary guardian; but where the children, as far as they could from their age be brought up in any religion, appear to have been brought up as Protestants in the lifetime of their father, and with his sanction, I think the *appointment of a Protestant guardian is, in conjunction with the other circumstances of the case, an indication of his wishes, which the court should attend to.*

"The mother, the testamentary guardian, states in her affidavit, that she verily believes that, if her husband had survived, he would himself have reared all the minors Protestants. And that she also believed that, in nominating in his will her whom he well knew to be a strict Protestant to be the guardian of the persons of his children, he did so in the expectation and with the object that they would be reared Protestants; and that she believed, that if the said minors should be now educated in the Roman

Catholic faith, upon the presumption of their deceased father's desire, it would, in fact be contrary to his real sentiments and wishes. No doubt there is difficulty in the case, from the fact that the children were baptized by clergymen of the Roman Catholic Church, and their births entered in the Douay Bible; and that of the thirteen sponsors three were Roman Catholics and ten were Protestants. But the question which I have to decide is, *has the father of the minors indicated a wish that his children should be brought up as Protestants?* On the best consideration I can give the case, I am of opinion that he has indicated such intention, and that the court is bound to carry it out. It has been contended, that *the circumstances of the children having been brought up Protestants since the death of the father in 1850 (six years), would in itself be a reason against having any alteration made as to the religious faith in which the minors have been brought up.* And such argument might have weight in respect of the two elder minors, on the authority of the case of Fallons minors not reported, decided by the Lord Chancellor, and referred to by counsel.

"On the other hand, it has been said that the testamentary guardian has not been in the habit of attending any place of public worship since her husband's death, and that none of the children are of an age, having regard to the want of religious instruction, to have formed opinions on the subject. I do not, however, think it necessary to express an opinion on the latter ground, and I decide the case on the ground that the weight of evidence is in favor of an intention on the part of the father of the minors that they should be brought up in the Protestant faith."

In a recent case, *Stourton vs. Stourton*, W. R. 1856-7 p. 418, the principle laid down in the above cited case, *Follons minors*, has been acted upon, and it has been conclusively decided, that where a child has been for a long time educated in a different faith from that of his deceased father, the Court of Chancery will not interfere.

CAMPBELL vs. HOOPER. 3 Sm. and Giff., 153.

Lunatic—Mortgage made by, to bona fide Mortgagee, valid.

A person executed a mortgage, being at the time a lunatic; the mortgagee, however, who advanced the money *bona fide*, was not aware, at the time he did so, of the state of the mortgagee's mind, and took no advantage of it. Sir John Stuart V. C., held that the mortgagee was entitled to a decree of foreclosure against the real and personal representative of the mortgagor. "Even at law," said his Honor, "the contract of a luna-

tic is not necessarily void. Even at law, the plaintiff in an action at law, seeking to recover, under the contract of a person whose lunacy is established, has been held entitled to relief. That was the case of *Baxter vs. Lord Portsmouth*, 5 B. and C. 170, where the lunacy was established beyond a doubt. The court of law gave relief on the footing of the contract.

The principal has been established at law in other cases, and by the Court of Exchequer Chamber in the case of *Molton vs. Camroux*, 2 Exch. 487, which was decided after a laborious and accurate examination of all the authorities. Mr. Justice Patterson, in the case of *Dane vs. Lady Kirkwall*, 8 C. and P. 685, in directing the jury laid down the law thus:— ‘It is not sufficient that Lady Kirkwall was of unsound mind, but you must be satisfied *that the plaintiff knew it, and took advantage of it.*’ It would be a strange thing if a court of equity, in dealing with contracts, were to deal on a different principle. See, however, *Jacob vs. Richards*, 5 De G., M. and G. 55.

DEAN *vs.* THWAITE. 21 Beav., 621.

Mines—Working those of a Neighbor—Mode of directing an Account—
Onus probandi.

In this case the defendant had, by underground working, taken the coal of his neighbor. It was held by Sir John Romilly, M. R., that the defendant could only be compelled to account for what he had taken six years before the filing of the bill, see 3 and 4 Will. IV, c. 27, s. 26, but the onus of proving what part had been taken during such six years, lay upon the defendant, who was a wrongdoer.

“The way,” said his Honor, “I intend to deal with the account is this:— I shall see if the parties themselves can agree as to the amount and extent of these workings. If they cannot, then I shall probably appoint, under the powers intrusted to me by the Act of Parliament (which, I think extends to cases of this description,) some coal agent, who is perfectly well acquainted with matters of this description, to examine and make report as to the state of the works, and as to what coal has been taken from under certain plots of land of the plaintiff, which will be specified, and to take all proper measurements for that purpose. Suppose he finds that a certain quantity, suppose 1,000 tons, has been taken, I shall then call on the defendant to show what portion of that coal has been taken prior to the six years.

"I think the burden of proof ought to rest on the defendant, for this reason:—I assimilate this to the case, which I have frequently had occasion to refer to, of the chimney-sweep who found the diamond ring—*Armory vs. Delamirie*, 1 Stra. 505—and governed by the principle which I have constantly acted upon, that the case will be taken most strongly against a person who keeps back and destroys evidence. I apply that principle to a person whose duty it was to keep strict evidence of what workings there were in other persons' lands, and shall charge a person working the coal mines in the adjoining land with the full amount raised, unless he can prove it was not taken within the time during which the court directs the account. On the taking of that account, I shall certainly not treat this as a case of fraud, but shall act on any reasonable evidence I can get to ascertain at what time the coal was worked. This is the view I take with respect to the mode of taking the account of coal worked."

In the Courts of Common Law.

BRASS *vs.* MAITLAND. 6 Ell. & Bl., 470.

Ship—Liability of Shippers of Goods of a Dangerous Character.

The first count of the declaration complained that plaintiffs were owners of a general ship; that defendants caused a corrosive substance to be packed in casks, and delivered to plaintiffs as casks of bleaching powder, to be carried in the ship; that plaintiffs and their agents were ignorant that bleaching powder contained a corrosive substance, and the casks outwardly appeared to be sufficient. But that the casks were insufficient, and the contents so improperly packed, that the corrosive contents escaped and destroyed the cargo.

The second count complained that defendants shipped a dangerous article, knowing it to be such, without notice of its danger; and the plaintiffs, without knowledge of its dangerous nature, received it, and stowed it in the hold, where it did mischief. The defendant pleaded *inter alia* to so much of the first count as relates to the insufficiency of the packages: that defendants purchased the goods ready packed from third persons named, and were not themselves, or by their servants, guilty of negligence. Fourthly, to first count: that the persons employed on the ship knew, and had the means of judging, of the sufficiency of the casks. Tenthly, to the second count: that the master of the ship knew, or had the means of knowing, the dangerous nature of the goods. On demurrer to these pleas,

it was held in the Court of Queen's Bench, by Lord Campbell, C. J., and Wightman, J., that there is an implied undertaking on the part of shippers of goods on board of a general ship, that they will not deliver, to be carried on the voyage, packages of a dangerous nature, which those employed on behalf of the ship-owner may not, on inspection, be reasonably expected to know to be of a dangerous nature, without giving notice. That, consequently, both counts were good, and the third plea bad.

But that the fourth and tenth pleas, which they construed to amount to an allegation of facts equivalent to notice, were good. It was held by Crompton, J., that the implied undertaking of the shipper did not extend beyond an obligation to take proper care not to deliver dangerous goods without notice : and that on the first count and third plea, taken together, the defendants appeared to be innocent shippers of goods, dangerous in fact, but without any negligence on their part ; and that, therefore, the defendants should have judgment on the third plea. He agreed with the rest of the court, that the fourth plea was good, and the second count good ; but he construed the tenth plea as not amounting to an allegation of notice, and therefore held it bad.

RENTER *vs.* ELECTRIC TELEGRAPH CO. 6 Ell. & Bl., 341.

Corporation—Obligation of Parol Contracts on Trading Corporation.

The defendants were incorporated by royal charter for trading purposes. By the deed of settlement, the directors were to manage the business of the company ; but all contracts above a certain value were to be signed by at least three individual directors, or sealed with the seal of the company, under the authority of a special meeting.

Plaintiff sued the company on an agreement above the prescribed value. It was within the scope of the company's business, and was made by parol with the chairman, who, with his own hand, entered a memorandum of it in the minute-book of the company. It was recognized in correspondence with the secretary : plaintiff did work under it, and received payments by checks for it. These payments passed into the accounts of the company, and were audited and allowed ; but there never was any contract signed by three directors, or under the seal of the company.

On a case stating these facts, with power to draw inferences of fact, the Court of Exchequer held that the contract was ratified, if not authorized by the company, and binding.

SNEAD *vs.* WATKINS. 1 Com. Bench, N. S., 267.

Innkeeper—Lien—Goods brought by a Guest, but belonging to Third Person.

One Hulme, who had formerly been clerk to the plaintiff, an attorney, was subpoenaed as a witness in an action brought by the plaintiff to recover the amount of bill of costs. Hulme put up at a public house of entertainment at Westminster, kept by the defendant, bringing with him a bag containing, amongst other things, a letter-book belonging to the plaintiff. Whilst at the defendant's house, Hulme became indebted to the defendant for lodging and refreshments, and quitted without paying his bill, leaving behind him the bag with the letter-book, which the defendant refused to deliver up to the plaintiff on demand, claiming a lien on the bill against Hulme.

The Court of Exchequer held that the claim of lien was valid.

DUTTON *vs.* GUARDIANS OF CLUTTON UNION. 1 H. & N., 627.

Watercourse—Right to Flow of Water from Spring Head.

The plaintiff's mill was situated on a stream partly supplied through a natural channel from "The Red House Spring," rising in a field belonging to Captain Scobell. The defendants, in order to obtain a supply of water for the Union Workhouse, which was about a mile from this field, took from Captain Scobell a grant of the use of the spring, and constructed works in the field so as to cut off the water at its source before it came to the surface, and receive it into a deep tank for supplying the workhouse water-pipes. The stream that served the plaintiff's mill was by this means greatly diminished in force, and the Court of Exchequer unanimously held that this was a wrongful act on the defendants' part, and that the plaintiff was entitled to recover damages. Baron Martin observed, "the owners of lands adjoining a stream have a natural right to the use of the water of it. A river begins at its source—when it comes to the surface; and the owner of the land on which it rises cannot monopolize all the water at the source, so as to prevent it reaching the lands of other proprietors lower down."

KINGSFORD *vs.* MERRY. 1 H. & N., 503.*Delivery Order—Title of Pledgee from Holder obtaining Possession by Fraudulent Representation.*

This was an action of trover for three tons of tartaric acid. The plaintiffs were manufacturing chemists, and in April, 1853, Jones & Co., as brokers, sold for them two tons of the acid, to be delivered in November. In October Gray & Co., as brokers, sold for the plaintiffs two tons more of the acid, to be delivered also in November. The brokers respectively sent to the plaintiffs sold notes, not disclosing the principal. In November the invoices were sent to the brokers in the usual course, and soon afterwards delivery orders for three tons of the acid were left with the plaintiffs by the clerk of one Anderson, viz: the first signed Jones & Co., for delivery of one ton to Mr. Thomas Broomhall, and endorsed by Broomhall, "Deliver to my order;" the other signed by Gray & Co., for delivery of two tons to Broomhall, endorsed by Broomhall, "Deliver to W. Leask. John Ellis." "Deliver at Custom-house Quay to my sub-order. W. Leask."

Leask was a broker, and Anderson induced him to purchase the acid for him on a false representation that he was acting for Van Notten & Co., and subsequently obtained from Leask the delivery orders, endorsed as above, on the pretence of inspecting the acid. Anderson was never authorized to take possession of the acid, but stated to the plaintiffs that he had purchased the acid of Leask, and requested them to deliver it to him. The plaintiffs, deceived by Anderson's representations, gave him a delivery order, and the acid was transferred into his own name, and he thus obtained warrants, and pledged the acid with the defendant for a *bona fide* advance.

The Court of Exchequer Chamber held (reversing the judgment of the Court of Exchequer) that under these circumstances the relation of vendor and vendee did not subsist between the plaintiffs and Anderson, and that the property in the acid did not pass to Anderson, and that mere possession, with no further *indicia* of title than the delivery order, was not sufficient to entitle the defendant, though a *bona fide* pawnee, to resist the plaintiff's claim in an action of trover.

NOTICES OF NEW BOOKS.

REPORTS OF CASES ARGUED AND DETERMINED IN THE HIGH COURT OF ERRORS AND APPEALS FOR THE STATE OF MISSISSIPPI. Vol. XXX. By JAS. Z. GEORGE, Reporter to the State.

Mr. George succeeded Mr. Cushman as reporter to the High Court in 1854, but, until the appearance of this work, we have had no evidence of his labors. Knowing Mr. George to be a sound and learned lawyer, his election afforded us gratification, and thus far, in his official career, he has more than justified our expectation of his fitness for the station.

Taking this volume as a test of his qualifications for the office, they are certainly of a high order, and that he has discharged his duties faithfully and with signal ability, no one can doubt.

The syllabuses of the cases decided, deserve much commendation. The reader, as in many modern reports, is not obliged to shift the bushel of chaff to reach the grain of wheat. They are clear, concise and accurate, setting out with precision the doctrine of the case, carefully excluding the *dicta* of the judges, and giving the whole decision, with no more and no less.

This part of a reporter's duty is difficult and important, and to accomplish it, requires learning and much discrimination. The highest powers of bench and bar are often exhibited by a critical analysis of adjudged cases, and so liable are reporters to err in this particular, that lawyers deem it unsafe to rely on the abstracts of the points decided, without a careful examination of the decision itself.

It is not uncommon in reading the opinion of a court to discover that material facts have been omitted in the statement of the case by the reporter. We have discovered nothing of this in the volume before us. The facts upon which the decision turns are stated briefly, though with accuracy and completeness.

The index of this volume is full and logically arranged, and although there is some repetition, yet it is desirable that such should be the case, for an index that is valuable should be a perfect abstract of the Report.

We are pleased to see that Mr. George devotes a larger space than is usual to the arguments of counsel. Their part, whether well or ill performed, is an essential feature in every judicial trial. No better mode has yet been discovered to establish judicially either law or fact, than by the

agency and discussion of opposing counsel, and a report which omits important arguments cannot be a full report of the case.

In cases of novelty and importance, the general outline and the heads of the argument should be given. A mere conglomeration of authorities gives about as good an idea of argument as the skeleton does of the body when clothed with flesh and breathing the breath of life, and if nothing more is to be done, might as well be omitted.

Again, in the examination of a decision, we wish to see what points were distinctly presented and what views were taken by respective counsel, without this it is impracticable to determine, whether or not the opinion of the court covers the whole case as prepared and presented for adjudication. The argument should be so far given as to show clearly the grounds on which the case was put.

Nor do we think it claiming too much credit for the bar, to say that sometimes, at least, their arguments are of value beyond the immediate bearing of the case in hand. It is no difficult task in a lawyers library to find arguments replete with interest and instruction, exhibiting great research, learning and eloquence.

Those of luminous and powerful intellects, who delight and astonish their cotemporaries, pass away and leave only the faint foot prints of their power upon the pages of the Reporter.

Who is there that has read the masterly arguments of a Parsons, a Pinkney, or a Prentiss, but regrets that so little remains of the labors of such great and gifted minds?

The judiciary of Mississippi has always enjoyed a reputation for ability and attainments, and we think the opinions reported in this volume will sustain that reputation. They are generally characterized by sound judgment and varied learning.

The several members of the court are able men, and well fitted by their distinct intellectual traits to act together with advantage.

We can only add, that, from our judgment of this volume, it would have been difficult for the legislature to have selected a Reporter, who will do the court more service than Mr. George, or one whose labors will be more creditable to himself and the profession.

W.

A PRACTICAL TREATISE ON THE LAW OF CARRIERS OF GOODS AND PASSENGERS by Land, Inland Navigation, and in Ships; With an Appendix of Statutes and Forms of Pleadings. By THOMPSON CHITTY, Esq., and LEOFRIC TEMPLE, Esq., Barristers at Law. With Notes and References to the American Decisions, by DAVID W. SELLERS. Philadelphia: T. & J. W. Johnson & Co., 535 Chestnut street. 1857. pp. 642.

In this commercial country, abounding in railroads and canals, professional men are constantly consulted by carriers and by shippers and consignees, and perhaps no branch of law has received a larger share of legal attention in modern times than the law of carriers. The vast number of decisions, both in England and in this country, attest the truth of the remark. Hence the publishers did wisely in submitting an English treatise to the profession, with American notes and references. We have examined these latter with much interest and pleasure. We think they are conceived and executed in the true manner and spirit of annotation—not so elaborate as to amount to treatises in themselves, and not so barren as to be merely a finger guide to a case, but reasonably brief and carefully sifted and judiciously placed. We think the Messrs. Johnson did wisely in entrusting this duty to Mr. Sellers, who well deserves the thanks of the profession for his satisfactory labors. As usual with all the books now printed by this excellent law-publishing house, the mechanical execution of the work is admirable—type and paper models, the former large and leaded, and the latter white and clear. The whole book may be taken as an excellent specimen of American law publishing.

ENGLISH REPORTS IN LAW AND EQUITY: Containing Reports of Cases in the House of Lords, Privy Council, Courts of Equity, and Common Law, and in the Admiralty and Ecclesiastical Courts; Including also Cases in Bankruptcy and Crown Cases Reserved. Edited by CHAUNCEY SMITH, Counsellor at Law. Volume XXXVII. Containing Cases in the Courts of Queen Bench, Common Pleas, and Exchequer, and Crown Cases reserved, during the year 1856. Boston: Little, Brown & Co. 1857. pp. 672.

This useful series continues with its usual interest and value. We do not think it necessary to say anything more than occasionally announce a new volume. The series is very generally to be found in the practicing lawyer's library.

REPORTS OF CASES ARGUED AND DETERMINED IN THE ENGLISH COURTS OF COMMON LAW; With Tables of the Cases and the Principal Matters. Edited by Hon. GEO. SHARSWOOD. Volume LXVII. Containing Cases in the Common Pleas in Hilary term, and Vacation and Easter and Trinity Terms, 1856. Philadelphia: T. & J. W. Johnson & Co., Law booksellers, No. 535 Chestnut street. 1857. pp. 849.

COMMON BENCH REPORTS, CASES ARGUED AND DETERMINED IN THE COURT OF COMMON PLEAS. By JAMES MANNING, Sergeant at Law, and JOHN SCOTT, of the Inner Temple, Esq., Barrister at Law. Volume IX. Philadelphia: T. & J. W. Johnson & Co., Law booksellers, No. 535 Chestnut street. 1857.

We are glad to announce, after a great lapse of time, the completion of the *ninth* volume of Common Bench Reports. This volume embraces Hilary Term, and Vacation and Easter and Trinity Terms, 1856, and is now just published in England. The American publishers have at once given it to the profession here, the entire delay having occurred in England. We announce its publication so that our professional brethren may procure it and complete the series of Common Law Reports.

A PRACTICAL TREATISE ON THE LAW RELATING TO TRUSTEES, THEIR POWERS, DUTIES PRIVILEGES, AND LIABILITIES. By JAS. HILL, Esq., of the Inner Temple, Barrister at Law, and fellow of New College, Oxford. Third American edition, containing the Notes to the first edition, by FRANCIS J. TROUBAT; With full Notes and References to Recent English and American Decisions, by HENRY WHARTON. Philadelphia: T. & J. W. Johnson & Co., Law Booksellers, Publishers, and Importers, 535 Chestnut street. 1857. pp. 911.

This book has now assumed a permanent place in our libraries, and new editions are regularly issued. The annotations are by Mr. Wharton, one of the editors of this journal, and well known to the profession by his various editorial labors. Perhaps no further comment would be proper than to announce that a former large edition has been exhausted in about two years, which may serve to mark the professional estimate placed upon the work. No other modern practical book on the law of trustees can compare with this extremely well digested and arranged treatise of Mr. Hill, who is a distinguished barrister of the Inner Temple, London.

AN ANALYTICAL INDEX OF PARALLEL REFERENCES TO THE CASES ADJUDGED IN THE SEVERAL COURTS OF PENNSYLVANIA; With an Appendix containing a Collection of Cases Overruled, Denied, Doubted, or Limited in their Application. By SAMUEL LINN. Philadelphia: Kay & Brother, 19 South Sixth street, Law book-sellers, Publishers and Importers. 1857. pp. 768.

The object of this book can be best stated in the words of the author. "Its intention," says he, in his preface, "is to enable the student to refer from any given case or any given subject to all the subsequent cases wherein the principal case has been cited or commented upon by court or counsel, thus bringing into view at a glance most, if not all, of the later authorities on the same point. Every lawyer knows with what facility a principle may be traced backwards, through the books, by means of the references contained in the later cases to earlier authorities, how it can be thus followed up to its very source. But a principle cannot by the same process be traced forward, from its rise to its later development, for the very obvious reason that no case can refer to future cases which then have no existence. But by means of this simple arrangement a principle may be readily pursued through the books from its origin to its latest growth—from its infancy until it arrives at full stature.

Another advantage intended to be derived therefrom is the means which it will afford to test the value of any case, as authority for the principle which it purports to decide, by the references to all the subsequent cases wherein it is mentioned or commented upon in the opinion of the court.

The practical advantage and utility of the work cannot be better explained than by the following extract from a letter addressed to the author by the Hon. Geo. Sharswood:

"To be able to ascertain at a glance, whenever a case is cited, the extent of its authority, will make it an essential *vade mecum* of the practitioner; while to the student, the counsel, and the judge, to be thus assisted by references to all future cases in which the principal case has been cited, and relied on as authority, commented on, explained, qualified, doubted, shaken, or overruled, will so materially assist legal investigation that its importance can hardly be over estimated."

That such a book must be the result of much "patient labor" cannot be doubted, and nothing can be more true than Mr. Linn's observation that

"books of reports have become so voluminous, and adjudicated cases have multiplied so rapidly, as to render the labor incident to the investigation of questions daily occurring in practice, exceedingly irksome, and the difficulty is in no small measure enhanced by the irreconcilable and contradictory cases which are to be found scattered through the books. To this state of things the experience and observation of every judge and practicing lawyer will bear ample testimony."

Now, the only question is, does this book accomplish its design. If it does, no active practitioner in this State, or perhaps any other State, can afford to be without it. If it does not, it is worthless, and will serve only to mislead and embarrass. Let us, then, test it practically. Take any well known case—say *Steele vs. the Phoenix Insurance Company*, 3 Binn. 306. We turn to the case, and under it we find no less than *thirty* references. Here, at view, we see every case cited in which the principal case is discussed. Instead of slowly and painfully passing, as an unaided reader would be obliged to do, from book to book tracing his authorities, it is here done to his hand, and many weary hours economized. Take another case, equally well known—*Calder vs. Bull*, 3, Dall. 386. Here we have *twenty-five* references; another case, much more modern, *Bradde vs. Brownfield*, 2 W. & S. 271, here we have *sixteen* references; another, *Adlum vs. Yard*, 1 Rawle, 163: here we have *forty-six* references. Page twelve contains ninety-eight references; page one hundred and twelve, seventy-seven references; page two hundred and sixteen, eighty references; page four hundred and seven, one hundred and twenty-three references. The Index of Parallel References contains six hundred and sixty-eight pages, each page containing at least *seventy* references, or not far in the aggregate from *fifty thousand* references. When it is remembered that each reference has been carefully consulted, and most of them necessarily studied, the amount of "patient labor" is truly wonderful. We have taken the pains to study up one or two of the cases to see whether we could discover any omission, but our researches have not enabled us to find that any reference has escaped the diligence of Mr. Linn. It is not often that a professional book falls under our editorial attention that has challenged so much investigation at our hands, and has left so little to complain of. The design of Mr. Linn is fully and adequately accomplished, and the student hereafter will have nothing to do but to note on the margin of his copy any additional references, and he will always have an index of real practical value to aid him in his researches.

The Appendix of cases overruled, doubted, denied, commented on, and qualified, we have not yet had time to examine with any degree of care ; but we cannot doubt, from the admirable manner in which the former portion of this work is executed, that the remaining part is equally commendable.

PENNSYLVANIA STATE REPORTS, VOL. 27 : Comprising Cases Adjudged in the Supreme Court of Pennsylvania. By **JOSEPH CASEY**, State Reporter. Volume III, Containing Cases decided in part of January and May terms, 1856 ; and in October term, 1856. Philadelphia: Kay & Brother, Law Booksellers, Publishers and Importers, 19 south Sixth street, east side. 1857. pp. 576.

Mr. Casey now gives us his third volume, which has much the same merit as the second one, and is certainly superior to the first. The Pennsylvania decisions have not in late years been remarkable for the manner in which they have been sent into the world by the official reporters to take their place in the lists of American jurisprudence. It is, therefore, with some satisfaction that we find a new reporter, perfectly competent, certainly, really endeavoring to make a series of creditable reports of one of the very first judicial tribunals in the country. The task of State Reporter is no sinecure, and no one is competent to pass judgment upon his editorial brother until he has himself attempted to report ; and when he sees the crude material, in the shape of hastily prepared paper books, and brief arguments hinted at and suggested, rather than stated, out of which he is expected to fashion a clear statement of facts, a methodical arrangement of arguments, and a well corrected opinion, he will not be disposed to find fault if sometimes a reporter fails in making his cases intelligible and exact.

A reporter cannot, with any amount of diligence, repair the mischances that occur to a case from the negligence or haste of counsel, the over-burdened judge taking for granted much that is plain to him and the counsel concerned, but not so obvious to a stranger to the case ; and he cannot be expected to master every thing that he is obliged to print. But Mr. Casey requires less allowance than usual, his labors being remarkably well executed.

REPORTS OF CASES ARGUED AND DETERMINED IN THE SUPREME COURT OF ALABAMA DURING JUNE TERM, 1856, AND A PART OF JANUARY TERM, 1857. By JOHN W. SHEPHERD, State Reporter. Volume XXIX. Montgomery: Barrett & Wimbish, Printers. 1857. pp. 806.

We endeavor to keep our readers advised of the publication of the State reports, and the more important treatises and law publications. We have now upon our table Alabama Reports, volume twenty-nine, new series. The very limited time allowed us for an examination does not enable us to present our readers with as satisfactory an opinion on this book as we sometimes can. But the well-known character of Mr. Shepherd, the reporter in his own State, and the reputation of the court, give us a guaranty that the volume is of the usual excellence. We have marked, and shall extract a case or two for our next number.

PRECEDENTS OF INDICTMENTS AND PLEAS, adapted to the use both of the Courts of the United States and those of all the several States; together with Notes on Criminal Pleading and Practice, embracing the English and American Authorities generally. By FRANCIS WHARTON, author of "A Treatise on American Criminal Law;" "A Treatise on the Law of Homicide in the United States;" "A Treatise on Medical Jurisprudence," etc. etc. Second and revised edition, Philadelphia: Kay & Brother, 19 south Sixth street, Law Booksellers, Publishers and Importers. 1857. pp. 823.

This is by far the best work of precedents in criminal law that has yet appeared among our books. The favor with which the first edition was received marked the professional estimate placed upon it; and in this edition a thorough and careful revision of all the forms and the appended notes has taken place, and a remodeling and classification of the text, and interchange of reference between this work and the American Criminal Law is a most manifest improvement. It would seem to be difficult to add anything material in the plan and execution of this book of precedents. All that can be done in future editions must consist of the citation of additional cases, and the addition of new references. We are satisfied that Mr. Wharton has laid the profession under great obligation by his valuable labors.

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AUGUST, 1857.  
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**SUGGESTIONS AS TO THE MODE OF AUTHENTICATING THE
JUDGMENTS OF JUSTICES OF THE PEACE OF ONE STATE,
SOUGHT TO BE MADE EVIDENCE IN ANOTHER.**

In what manner the judicial proceedings of the justices of the peace of one State, should be authenticated so as to be evidence in another, is a question not thoroughly settled, although the subject of much discussion.

In the following pages we propose to consider the most important decisions on this question, and suggest what seems to be the only proper modes by which judgments of justices of the peace should be authenticated, to be admissible as evidence in the courts of any State of the Union.

And in treating of the mode of authenticating such judgments, we will first consider, whether they come within the provisions of the acts of Congress of May 26, 1790, ch. 11, or of March 27, 1804, ch. 56.

These acts are the result of the power conferred on Congress by the first section of the fourth article of the constitution. This section provides, that "full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State. And the Congress may by general laws, prescribe

the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

What may be the effect of the first clause of this section, whether it is requisite that the mode of proof prescribed by Congress should be conformed to, otherwise the full faith and credit declared by the constitution cannot be extended to such records and judicial proceedings as are not so proved, is not here a question. We have only to do with the second part of the section; "and the Congress may by general laws, prescribe the manner in which such acts, records and proceedings shall be proved."

Congress, by the act of May 26, 1790, has exercised the power thus conferred upon it. This act provides, "that the records and judicial proceedings of the courts of any State shall be proved or admitted in any court within the United States, by the attestation of the clerk and seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the said attestation is in due form." And the act concludes with declaring what faith and credit these records and proceedings thus proved, shall have within the United States.

In further fulfilment of the provisions of the constitution, Congress, by the act of March 27, 1804, provides a mode for proving the public books of the States and Territories, "not appertaining to a court," and extends the provisions of the act of 1790 to the records and judicial proceedings of the territorial courts.

But much doubt has been entertained, whether there is not another class of documents, for which Congress has not yet provided, namely, the records, so called, and judicial proceedings of justices of the peace.

It is evident that the act of 1804 does not apply to the documents in question, for the words of the act are: "all records and exemplifications of office books, which are, or may be, kept in any public office of any State, not appertaining to a court." And it has been decided, that this act applies only "to public writings recognized by common law as invested with an official character, and, therefore, susceptible of proof by secondary means, but which are not

of the nature of judicial records or judgments." *Snyder vs. Wise*, 10 Barr's (Pa.) R. 157; *Lawrence vs. Gaultney*, Cheves' L. & E. R. 7; *Gay vs. Lloyd*, 1 Greene's (Iowa) R. 78.

And, therefore, it is held, that the judgments of justices of the peace are not within the purview of this act of Congress. But whether they come within the provisions and intent of the act of May 26, 1790, is a mooted question.

In order, by the most liberal construction, to bring within this latter act "the records and judicial proceedings" of every court of justice, and thus fulfil what would seem to be the intention of the clause of the constitution above quoted, the courts of several of the States have decided, that if the justice is bound by the law of his State to keep a record, technically so called, of his proceedings, they are within the meaning of the act of 1790, and may be certified according to its provisions.

In Connecticut, in the case of *Bissell vs. Edwards*, 5 Day's R. 363, the decision of the court concludes thus: "When courts of justices of the peace are courts of record, they come within the act of Congress. In those States where justices of the peace hold courts of record, where they are the sole judges, and have no other persons to be their clerks, they are the presiding magistrates and clerks of their own courts, and may certify their records in a manner conformable to the act of Congress. After attestation of the record, a justice of the peace may certify that he is the presiding magistrate and clerk of the court, that there is no seal, and that the attestation is in the usual form, and then subscribe it as justice of the peace. This would be a literal compliance with the act, and the copy of the record so certified, would be admissible evidence."

In the Vermont reports there are three cases confirmatory of the above decision. The first is the case of *Starkweather vs. Loomis*, 2 Verm. R. 578, in which the judge, in addition to what was decided in Connecticut, said, "that the justice not having an appropriate seal, might use a common one." The case of *Blodget vs. Jordan*, 6 Verm. R. 580, confirms the decision in 2 Verm. R. There is also a *dictum* in the case of *Brown vs. Edson*, 28 Verm. R. 447, with respect to a decision in 1 D. Chip. R. 59—the case of *Ingersoll vs.*

Van Gilder, decided in Vermont in 1797, and probably the earliest decision on the question after the passage of the act of 1790. The *dictum* in 23 Verm. R. is: "That the case of *Ingersoll v. Van Gilder*, where it is said that a judgment of a justice of the peace in another State, cannot be authenticated in the mode prescribed by the act of Congress, has not been regarded as law for many years. A justice must certify his record, and then certify that he has no seal or clerk, but acts as clerk of his own court, and that the foregoing attestation is in due form; and such record is as conclusive, to all intents, as the record of the highest court in the State."

There is a direct decision in 8 Munree's (Ky.) R. 62, *Scott vs. Cleveland*. In conclusion, the judge said, "that the record of the justice was a judicial proceeding of a functionary of a sister State, and was authenticated as the act of Congress requires, and as such no objection exists to its admission."

There are also *dicta* approving the foregoing decisions in 8 Porter's (Ala.) R. 306, *Dozier vs. Joyce*; in 2 Ala. R. 310, *Huff vs. Cox*; and in 23 Miss. R. 505, *Stewart vs. Swantz*.

But the weight of opinion is, that the courts of justices of the peace, in most of the United States, are not courts of record. And this opinion is predicated upon the supposition that the organization and jurisdiction of those courts, although by statute in all the States, are the same, or very similar in every State of the Union. And the remarks which we are about to make on the nature of courts of record, with reference to the question whether the courts of justices of the peace come within that rank of courts, are made under the above supposition. What are their organization and powers, generally, it is unnecessary for us to say, as they are known to all.

But if either by statute or decision of any State it is determined that its justices of the peace hold courts of record, yet, as they are courts of inferior jurisdiction, and derive their authority wholly from statute, the statutes creating and organizing them must be shown in every instance, and so any peculiarity of the local law, whether by statute or decision, as above mentioned, must be shown to exist. It will never be presumed. See 10 Barr's R. 157; 8 Wend. 267.

In the common law, the great division of all courts is into courts of record, and courts not of record. And all courts of record are the king's courts. All courts, not the king's courts, are courts not of record; and these last are either what, in the common law, are called private courts, or courts of more general jurisdiction, but which do not proceed according to the course of the common law.

In Co. Litt. 260, a, and in Bacon's Abridg. "Courts," D. 2, we find that, in the general division of courts of record, or the king's courts, as flowing from him as the fountain of justice, are placed all courts exercising common law jurisdiction, and which are of a public nature, and that in the lowest rank of those enumerated in Bacon's Abridg. as courts of record, are placed justices of the peace. Also in 4 Inst. 177, and 3 Burn's Justice, 3, justices of the peace are called "judges of record." The lowest court of the kingdom, the court of *Piepoudre*, is a court of record, 3 Bl. Com. 82; and so also is the court of censors of the College of Physicians in London, Salk. 200; and also the court of the Commissioners of Sewers, Siderf. 145. And the reason those tribunals, although of less importance than many courts considered not of record, are held to be courts of record, seems to be simply that they come under the division of courts, called the king's courts, as being derived especially from him.

The power to fine and imprison has been regarded as the determining mark of a court of record. "All courts of record being the king's courts, therefore, no other court hath authority to fine or imprison, and the very erection of a new jurisdiction with power of fine or imprisonment, makes it instantly a court of record." 3 Bl. Com. 25. But this power to fine and imprison has been held to be incident to all courts, whether of record or not of record, so far as it regards *contempts* committed in the face of the court. 1 Wooddesson's Lect. 60; Bacon's Abridg. Courts, E; 1 Bre. (IH.) R. 266. And as there are some courts of record, which only have this limited power in fining and imprisoning, such as the court of *Piepoudre*, Court of Commissioners of Sewers, and justices of the peace, &c., (See Bl. Com. *passim*.) it would seem to follow, taking the power to fine and imprison to mean, the punishment, by such

means, of crimes and misdemeanors committed against the peace of the king, that it can hardly be taken as the determining characteristic of, nor inseparably incident to, a court of record. It is held, that in the early times of the feudal law, the private or baronial courts, never exercised any criminal jurisdiction, although they had exclusive jurisdiction over their vassals as to all civil matters. The king, or chief of the country, recognized no distinction between his follower and his subject, as to crime—both were equally under the power of the sword. Walker's *Theo. of the Com. Law*, 83. By degrees the king's courts acquired civil jurisdiction, and that of the baronial courts was much decreased in extent, or became concurrent with that of the king's courts. And so it happens that some of the king's courts, although courts of record, have not the power over criminal matters, as they were formed from the jurisdiction taken from the king's feudatories; while some, as the king's bench, sheriff's town, the courts lect, &c., (See 4 *Bl. Com.* 265,) being the original courts of the king, or chief, have all the criminal jurisdiction, and would seem to have given occasion to the power of fine and imprisonment, being considered the inseparable incident of the king's courts, as it certainly was in the early times.

But this is a question which we must leave to the legal antiquary to determine, as we have not sufficient space, nor would it be doing justice to the other parts of our subject, to consider it more fully.

"A court not of record is the court of a private man, whom the law will not entrust with any discretionary power over the fortunes, or liberty, of his fellow-subjects. Such are the courts baron, incident to every manor, the courts hundred, the county courts, and such like." *Co. Litt.* 117 b; 3 *Bl. Com.* 25; 1 *Burn's J.* 421. Also, at common law, the equity, admiralty, military, and ecclesiastical courts, are not courts of record, but derive their authority from the crown, but not as the fountain of justice, technically so called. 3 *Bl. Com.* 68; *Bac. Abridg. "Courts," D. 2.* For as all courts of record are, at common law, derived from the king as the fountain of justice, it is held, that the stream from that fountain must flow according to the course of the common law, and, therefore, that the above mentioned courts, though of a general jurisdiction and not of

a private nature, as the courts baron, &c., cannot be considered courts of record, as they proceed according to rules of law different in many respects, from the general law of the land. Co. Litt. 260 C. ; 1 Wooddesson's Lect. 59.

Let us consider, now, the application of these common law principles to this country. It is certain that no distinction, equivalent to that mentioned above, of public or king's courts, and private, or not the king's courts, has ever existed in the United States. In Maryland, under the Lords Proprietary, the baronial courts did exist, but seem to have become obsolete before the revolution. All courts, in this country, are public courts. None of the courts in the United States are by prescription ; but all are created by constitutions or statutes of the United States, or of the several States, by which their powers and jurisdictions are generally defined ; but pleas and proceedings in them are partly by these constitutions and statutes, and partly by the common law, and the customs brought from England. 6 Dane's Abridg. Am. Law, ch. 187, art. 1. From the above fact, it follows that, in this country, the distinction upon which courts of record, and those not of record, is based in England, cannot exist. And a bare consideration of the nature of those courts in this country, which are regarded as courts not of record in England, would corroborate the above position. The courts of admiralty and equitable jurisdiction, the county courts, and probate courts, are certainly here generally regarded as courts of record.

In the United States we have not adopted all the strict distinctions of the common law of England, but have modified it to suit our differently based institutions, in this as in many other of its doctrines.

Lord Coke, in 1 Inst. 260a, says: Record is a memorial of remembrance in rolls of parchment, of the proceedings and acts of a court of justice, which hath power to hold a plea according to the course of the common law, of real or mixed actions, or of actions *quare vi et armis*, or of personal actions, whereof the debt or damage amounts to 40s., or above, which we call *courts of record*, and are created by Parliament, letters patent, or prescription. But legally, records are restrained to the rolls of such only as are courts

of record, and not the rolls of inferior, nor of any courts which proceed not *secundum legem et consuetudinem Angliæ*. Co. Litt. 260 a.

With the modifications before suggested as necessarily arising from the nature of our judicial systems in the United States, we adopt this extract from Coke, as defining the idea of courts of record generally entertained in this country. And the general opinion would seem to be that a court of record in this country, is a court which possesses jurisdiction equivalent in importance to that mentioned by Coke, but which does not *ex vi termini*, "hold plea according to the course of the common law;" which must, in order to be entitled to the rank of a court of record, engross on "rolls of parchment," or in a manner equivalent, its proceedings, which office must be performed by a clerk, prothonotary or register, &c., in whose custody must also be deposited the records, as thus made, of the court. And a clerk would seem to be a constituent part of a court of record, also, in England, for there, even justices of the peace have their clerks. 1 Burn's J. 847. The other constituent part of a court of record in this country, seems to be a public and official seal, whereby the court may prove itself. 8 Bouvier's Inst. of Am. Law, 68; Walker's Am. Law, 841, 557. To a court of record, both in this country and in England, is also incident a writ of error. 5 Dane's Abridg. Am. Law, ch. 137, art. 8. From what has been before said, the power to fine and imprison would hardly *per se* seem to be the determining characteristic of a court of record.

If what we have above stated be law, then it follows, that courts of justices of the peace, as they are organized in most of the States, cannot be regarded as courts of record in this country. See Cowen & Hill's notes to Phil. on Evidence, part 2, p. 808, &c.

We come now to the consideration of the subject of this article, under the presumption that justices of the peace do not generally, in the United States, hold courts of record; that they keep no record, strictly so called, of their proceedings, but only "dockets;" that they have no clerks, nor official seals by which they may prove themselves; that they have only limited and inferior jurisdiction,

conferred by statute; and that, finally, from the above circumstances, the knowledge of their official existence is necessarily confined, not merely to the State, but to the county of their residence. And in this wise have the most weighty decisions in the country regarded them.

"We think the judicial proceedings referred to in the constitution," says C. J. Parker, in the case of *Warren vs. Flagg*, 2 Pick. R. 448, quoted in part in 1 Greenl. Evid., sect. 505, "were supposed by the Congress which passed the act providing the manner of authenticating records, to have related to the proceedings of courts of general jurisdiction, and not those which are merely of municipal authority; for it is required that the copy of the record shall be certified by the clerk of the court, and that there shall also be a certificate of the judge, chief justice, or presiding magistrate, that the attestation of the clerk is in due form. This, it is said, is founded on the supposition that the court, whose proceedings are to be thus authenticated, is so constituted as to admit of such officers; the law having wisely left the records of magistrates, who may be vested with limited judicial authority, varying in its objects and extent in every State, to be governed by the laws of the State, into which they may be introduced for the purpose of being carried into effect. Being left unprovided for by the constitution or laws of the United States, they stand upon no better footing than foreign judgments."

In New Hampshire, the decision in Massachusetts is confirmed by the cases of *Robinson vs. Prescott*, 4 N. H. R. 450, and of *Manhurin vs. Bickford*, 6 id. 567.

In New York the same doctrine is held; and further, that the statute conferring jurisdiction on the justice, must be shown, in addition to the ordinary proof of his proceedings. *Thomas vs. Robinson*, 3 Wend. R., 267; *Seldon vs. Hopkins*, 7 id. 435.

In Ohio, in the cases of *Kuhn vs. Miller*, Wright's (Ohio) R. 127, and of *Silver Lake Bank vs. Harding*, 5 Ohio R. 543, it is said, that it has been uniformly decided in Ohio, that the mode of, certifying justices' judgments is not prescribed by the act of Congress; for if he were within the act of Congress, as he is both clerk and

judge, and has no public seal, we would be obliged to receive a transcript from a docket as evidence, without other proof of his being a justice, and the transcript being correct, than his own signature and his private seal; but the courts of Ohio have invariably required other evidence of the person who certifies the transcript being a justice, than his own certificate, usually the certificate of the clerk of the county court, and the seal of the court.

In Iowa, in the case of *Gay vs. Lloyd*, 1 Greene's (Iowa) R. 78, the same doctrine is recognized. It also seems, from the case of *Trader vs. McKee*, 1 Scam. R. 538, to be the settled opinion in Illinois. In Pennsylvania, in the case of *Kean vs. Rice*, 12 Serg. & Rawle's R. 203, it is said, that if the court whose doings are sought to be proved, is so constituted that it cannot comply with the requisitions of the act of Congress, for lack of a clerk, or other requisite, its proceedings cannot be authenticated in this mode; and hence may be proved as if such court were strictly foreign. See also, *Baker vs. Field*, 2 Yeates' (Pa.) R. 532.¹

This question was fully discussed in Pennsylvania, in *Snyder vs. Wise*, 10 Barr's (Pa.) R. 157, and the opinions of the courts of Massachusetts, New Hampshire, &c., approved as the soundest view of the question. The court further says: "that its researches have not led it to a knowledge of any case by which it has been determined that the judgment of a foreign justice of the peace may be proved by the statutory certificates; for what has fallen from the Connecticut and Vermont courts upon the subject are but *dicta* predicated upon a supposed peculiarity of the local law, which, however, must be shown to exist. It will not be presumed."

In South Carolina, in the case of *Lawrence vs. Gaultney*, Cheves' L. and E. R. 7, it is held, that the acts of Congress do not apply to the judgments of justices of the peace, and, as is held in all the above quoted cases, we must find, either in the common law, or in a statute of the State into which these judgments may be introduced for the purpose of being carried into effect, the mode in which their admissibility as evidence may be established.

From the cases above cited, it is evident that the weight of opinion

¹ See *Com. v. Hinchman*, 8 Casey, 479; 5 Am. Law Reg. 424, S. C.

is, that if the justice's court is not a court of record, it is not within the provisions of the act of 1790, and that whether a court of record, or not of record, it is not within the meaning of the act of 1804.

But whether, it being a court of record, as in some States it is decided and enacted it is, it must, therefore, come within the provisions of the act of 1790, is still an unsettled point.

Among the cases above cited, deciding that judgments of justices are not within the acts of Congress, the only ones which notice at all the distinction between justices' courts of record and not of record, are the cases in 10 Barr, 3 Wend. and 5 Ohio; and they decide that a justice's court will never be presumed to be of record, but that it must be shown and proved.

The other cases all decide this question of the impracticability of proving justices' judicial proceedings by the statutory certificates, upon the ground that a justice's court is one of inferior and limited jurisdiction and of mere municipal authority, that it is generally deficient in the requisites mentioned in the act, and that finally, under the rules of evidence existing between the several States of the Union, the justice is not able to prove his own official existence, having no official seal for that purpose.

There is one species of courts—courts of probate—in some States, resembling justices' courts, and whose records, it seems to be settled, may be proved according to the act of Congress of 1790, although the court may unite in itself the offices of both judge and clerk. But this court is somewhat different from a justice's court, it having a clerk, or register, distinct, in the eye of the law, from the judge, though sometimes in the same person, while the duty performed as a clerk, by a justice, is rather an incident to his office, than a constituent part of the court. Moreover, most, if not all, probate courts, have official seals, and are, besides, courts of more general jurisdiction than courts of justices of the peace. See 1 Greenl. Evid., sects 503, 505, and cases there cited, and especially the case of *Ohio ex rel. Hinchman vs. Hinchman*, recently decided in Pennsylvania, and reported in 27 Pa. (3 Casey) State R. 479. See, also, *Catlin vs. Underhill*, 4 McLean's U. S. C. C. R. 199.

It is evident, from the nature of our confederacy, presuming that the judgments of justices of the peace are not provided for by congressional legislation, under the constitutional provision, that they must be regarded, at least so far as their mode of proof is concerned, as foreign judgments. 6 New Hamp. R. 567; 6 Pick. R. 238.

It is a settled principle of law, that the *lex fori* must always be conformed to in every thing relating to the remedy sought. Therefore, the law of the State into which the judgment of a justice of the peace may be introduced, for the purpose of being carried into effect, or made evidence, must govern, as to its authentication, independent of congressional legislation. This law is either the common law, or some statute of the State, fixing in definite form, the mode of authentication required in such State.

The different modes of authenticating foreign judgments, at common law, have been laid down by Marshall, C. J., as follows:—
1. By an exemplification under the great seal. 2. By a copy proved to be a true copy. 3. By the certificate of an officer authorized by law, which certificate must itself be properly authenticated. These he pronounces the usual, if not the only modes of verifying foreign judgments. *Church vs. Hubbard*, 2 Cranch's R. 237. See, also, 6 N. H. R. 567; 10 Barr's R. 157. We will now apply these modes, *mutatis mutandis*, to justices' judgments.

In some of the States, the judgments of their own justices of the peace are admissible in evidence, in any other courts of the same State, only upon the production of the docket containing the judgment sought to be made evidence, the handwriting of which docket must be proved to be that of the justice to whom it is presumed to belong, or, if the original docket cannot be produced, a *sworn* copy from such docket will be admitted. In other States, a copy from his docket, certified by the justice to be a true copy, &c., and attested by him, is deemed sufficient evidence, upon the principle that a copy given by a public officer, whose duty it is to keep the original, ought to be received in evidence. 1 Greenl. Evid., sect. 485. For decisions on this subject, in different States, see Cowen & Hill's notes, part 2, p. 300, &c., to Phil. on Evid.

If a justice's transcript is to be used in another county from that

in which he resides, then it is a general custom, we believe, in all the States, to verify the justice's official character by the certificate, under the seal of the clerk of the court of the county in which such justice resides.

If transcripts of justices' proceedings of the State in which it is sought to enforce or make evidence the judgment of a justice of another State, are admissible upon a certificate from the justices, or if only their being sworn to, will render them admissible, then such rule should be observed by the justice of the other State. But, in some cases, it is impossible to become acquainted with the law on this subject, in some particular State in which it is sought to produce in evidence a foreign justice's judgment. In such cases, if the following rule of law be observed, even an ignorance of the form required by statute, in such State, probably will not prejudice.

The rule of law is, that, in all cases, the highest evidence must be given of which the nature of the thing is capable. It is decided by C. J. Marshall, in the case in 2 Cranch's R., that in general, foreign laws and judgments are required to be verified by the sanction of an *oath*, unless they can be verified by some other such high authority, that the law respects not less than the oath of an individual. See, also, 1 Starkie's Evid. 155; 5 East's R. 473; 17 Mass. R. 543; 24 Verm. R. 501. And in none of the States can any higher evidence of the correctness of a justice's judgment be required, than a *sworn* copy from his docket.

The copy from the justice's docket must be proved by one who swears that he has compared it with the original, taken from the proper place of deposit. 1 Starkie's Evid. 158. Such affidavit should be made, we presume, in the same manner, and before the same person, as is an ordinary affidavit, to be used out of the State. *Church vs. Hubbard*, 2 Cranch's R. 238.

It is a presumption of law, that when a transcript from a justice's docket is given in this way, that the docket still remains before him and is in his possession, (12 Serg. & Rawle's R. 72); for it has been decided that if the docket of a justice has been returned to the court of the county in which he resides, and in which, in most, if not all, of the States, the dockets of magistrates going out of office,

&c., are deposited, it then becomes a record of such court, and may be certified under the act of 1790. *Manhurin vs. Bickford*, 6 N. H. R. 567.

We have now a copy from the justice's docket, proved in a manner which would seem to be unimpeachable. But it is also necessary that the person whose name appears in the copy, as a justice of the peace, should be proved to be so, and to be the justice before whom were had the proceedings of which a transcript from his docket is given.

Being unable to prove his own official existence, it must be shown by extraneous means. And for this purpose the following modes are suggested: 1. The highest evidence of any fact is an exemplification under the great seal. In this manner, it is suggested, the official character of the justice of the peace may be proved. A certificate, under the great seal of the State, may be attached to the sworn copy, from the Governor, Secretary of State, Chancellor, or whoever keeps the great seal, certifying the official character of the justice at the time of rendering the judgment, and that he is still a justice of the peace, &c., that he had jurisdiction in this cause, and that full faith and credit should be given to his official acts, &c. *Ex parte*, Povall, 3 Leigh's R. 816; 2 Bibb's (Ky.) R. 334; *Higgins vs. Squiris*.

This document, under the great seal, must be received every where, both in this country and abroad, among civilized nations, as the highest evidence known to the law of nations.

This is one, and we think an unimpeachable mode of verifying a justice's judicial proceedings, and his official position.

2. Another mode of proving a justice's official character, is a certificate, under seal, of the clerk or prothonotary of the court of the county in which the justice resides, specifying the same facts as are above mentioned in the certificate under the great seal. The clerk and his certificate, and the seal thereto affixed, should then be verified by the chief or presiding judge of the same court, and then the clerk should certify to the official position of the judge, &c.

But this mode of certifying the justice's official character, although evidently more convenient than the first, being a mode of proof not

sanctioned as the first is, by the common law, the existence of the State constitutional provision or State law giving such court jurisdiction over justices of the peace of its county, it is held, must be shown and proven; for it has often been decided, that the courts of one State, or country, are not bound, *ex officio*, to notice the local regulations of another. See Cowen & Hill's notes, part 2, p. 326, &c., to Phil. on Evidence.

This was the ground upon which the judgments of certain justices of the peace, whose official characters were certified to in the way above mentioned, but in which cases, however, the transcripts were not sworn to by any witnesses, but only certified by the justices, were refused to be admitted as evidence in Illinois. *Trader vs. McKee*, 1 Scam. R. 558; and in South Carolina. *Lawrence vs. Gaultney*, Cheves' L. & E. R. 7; and also in Iowa, *Gay vs. Lloyd*, 1 Greene's (Iowa) R. 78. See, also, 10 Barr's R. 157. But, in 1 Wright's (Ohio) R. 127, and 3 Ohio R. 545, before quoted from, the decision of the court in both cases was, that the prothonotary's or clerk's certificate has long been received in Ohio as evidence of the official character of a justice of the peace, of another State. See, also, *Morrison vs. Hinton*, 4 Scam. R. 457.

Moreover, it was held, in the case of *Ripple vs. Ripple*, 1 Rawle's (Pa.) R. 386, that the laws of a sister State were to be proved, as the laws of a foreign country, but that the acts of its courts might undoubtedly be resorted to for their exposition.

And in accordance with the mode last suggested, are such State statutes as we have seen.

The statutes of New York, (see L. N. Y., of 1836, p. 658, sess. 50, chap. 488, sects. 1, 2, 3;) of Iowa, (see Rev. Stat., sect. 19, 329,) and of Wisconsin, (see Stat. of Wisc. 320,) provide that a justice's judgment, of another State, is to be proved by a certificate of the justice, that the transcript is in all respects correct, (and, in New York, "that the said justice had jurisdiction of said cause"); and also a further certificate of the clerk or prothonotary of the county, or of the court of the county, in the mode before suggested.

There is also a similar statute in Pennsylvania, but which differs

from the statutes of the above States in this particular : instead of giving a certificate, the justice is required to make affidavit. And the cause of this provision seems to be, that in Pennsylvania a sworn copy from a justice's docket is alone evidence. 10 Barr's (Pa.) R. 157. This statute of Pennsylvania is the act of February 27, 1845. See Purdon's Digest, p. 482.

The statutes of New York and of Pennsylvania both provide only for "adjoining States." See the statutes, for other provisions.

But as the mode of proving the justice's official character, by the county clerk's certificate, is not admissible generally in the States, unless the law of the State, by which the clerk or prothonotary acts, be produced ; and as it must be difficult, if not impossible, at all times to prove such law, therefore, it is safer to adopt the mode of proof under the great seal of State, first suggested.

If there is even a statute similar to the one above mentioned, but such statute is unknown, still the mode of proof by the *sworn* copy, and the certificate under the great seal, would probably be good, for it is the highest evidence, and must be received in every court of justice of every State or country.

The only case in which we have found any definite mode of proving the judicial documents under discussion, laid down, is the case, before quoted from, of *Lawrence vs. Gaultney*, Cheves' L. & E. R. 7. At the risk of repetition, and as it suggests modes of proof we have not mentioned, we will give some extracts from the opinion of the Court of Appeals. The evidence which was produced to sustain the action in the court below, "consisted of the two *original* judgments and executions, with a certificate of the clerk of the county court in North Carolina, that the persons whose names were signed to the judgments were magistrates, and that their signatures were genuine, and the certificate of the presiding magistrate of the county court, that the person certifying was clerk." The court below, upon the ground of insufficiency of evidence, ordered a non-suit, and upon the appeal the decision of the Court of Appeals contains the following : "If neither Congress nor the State Legislature has prescribed any mode for proving such judgments, (and the acts of Congress of 1790 and 1804 do not apply to this

case,) then we must find in the common law, the rules by which they are to be established. The fundamental rules of evidence are, that the best shall always be produced, and that every fact shall be proved by the oaths of witnesses, unless the law has prescribed some other mode. The plaintiff had to show: 1st. That a justice had jurisdiction of his case by the law of North Carolina; 2d. That the person who decided it, was a justice; and 3d. That he did in fact render the judgment alleged."

"The certificates of the clerk and presiding magistrate of the county were not under oath; nor are they by any enactment made authentic in proceedings of this character. The law of North Carolina, by which the justices had jurisdiction of this case, might have been proved under the provisions of the act of 1790, or according to our precedents, by the production of the printed laws of that State. In the same manner it might be shown that the person who signed the judgment was a justice, if his appointment had been made by the Legislature. If the appointment was by the governor, or by any other authority, then an exemplification of the office books, certified according to the act of Congress of 1804, would have proved it."

M.

RECENT AMERICAN DECISIONS.

In the Supreme Court of Iowa, June, 1856.

McMANUS vs. CARMICHAEL.¹

1. Although the ebb and flow of the tide was, at common law, the most usual test of navigability, it was not necessarily the only one.
2. But however this may be, that test is not applicable to the Mississippi river.
3. The common law consequences of navigability, attach to the legal navigability of the Mississippi.

¹ From 2 Clarke's Cases in Law and Equity, determined in the Supreme Court of the State of Iowa. We are indebted to the learned State Reporter for this case; and regret that its very great length compels us to present only the head note and some of the more important parts of the opinion. The whole case is an elaborate discussion of an important branch of law, and the arguments of counsel and opinion of the court equally merit careful study.—*Ede. Am. L. Reg.*

4. The term *navigable*, embraces within itself, not merely the idea that the waters could be navigated, but also the idea of publicity, so that saying waters are public, is equivalent, in legal sense, to saying that they are navigable.
5. Yet the navigability, in fact, is the leading idea, and is the ground of their publicity.
6. The ebb and flow of the tide does not, in reality, make the waters navigable, nor has it, in the essence of the thing, anything to do with it.
7. It is navigability *in fact*, which forms the foundation for navigability *in law*, and from the *fact*, follows the appropriation to public use, and hence its publicity and legal navigability.
8. The real test of navigability, in this country, is ascertained by *use*, or by public act or declaration.
9. The acts and declarations of the United States declare and constitute the Mississippi river a public highway, in the highest and broadest intendment possible.
10. The rule that a grant is to be construed most strongly against the grantor, does not apply to public grants.
11. The government being but a trustee for the public, its grants are to be construed strictly.
12. Grants of land by the United States, by patent, have relation to the survey, plats, and field notes.
13. The common law knows but two lines—the *medium filum aquæ* and high water. If the stream be navigable, the boundary of the adjoining land is the one; if not navigable, the boundary is the other.
14. By the common law, the riparian proprietor on navigable waters, owns to high-water mark only, and this rule applies to the Mississippi river.

Appeal from the Scott District Court.

This was an action of trespass, for taking two loads of sand from the soil of the plaintiff, McManus. The *locus in quo* is in Scott county, and in the Mississippi river. The river, at this part of it, and for nearly thirty miles, runs nearly from east to west. In the middle of the river is Credit island, containing about two hundred and sixty acres. Between Credit island and the main land, on the north, or Iowa side, is a very small island, called Crane island, containing about seven acres. Off the east end of Credit island (it being up stream), is Pelican island, containing about eleven acres.

In 1837 or 1838, the United States surveyed, and in 1840 sold,

the public lands in Scott county. They surveyed the main land and Credit island, but did not survey the other two small islands, which overflowed; and which are now called Crane and Pelican. The main land on the Iowa or north side, opposite Pelican island, and the *locus in quo*, was sold to E. Cook, and Credit island to A. H. Davenport. At a subsequent date, Crane and Pelican islands were surveyed, and the latter sold to the plaintiff by patent, dated April 10th, 1849, in which the description is as follows: "Lot number three and Pelican island, of section three, in township seventy-seven, north of range three, east of the fifth principal meridian, * * * according to the official plat of the survey of the said lands returned to the general land office of the Surveyor-General," &c. At the east or upper end of Pelican island, is a *sand-bar*, which is exposed at low water, and which is the *locus in quo*. From this sand-bar between high and low-water mark, the defendant took two boat-loads of sand, taking it from the outside of the meanders of the survey by the United States. The whole island is subject to overflow at unusually high water.

The plaintiff has no other possession than a constructive one, arising from title, if he has this; and the object of this suit is to try his title to the sand-bar, outside of the lines of the survey, between high and low water, up stream. The court found for the plaintiff, and judgment was rendered in his favor, from which the defendant appeals.

Whitaker and Grant, for the appellant.

Cook and Dillon, for the appellee.

The opinion of the court was delivered by

WOODWARD, J.—This is the first case which has arisen in the Territory, or State, of Iowa, raising the question of riparian rights on the Mississippi river; and the question whether that river is a navigable stream, in the broad sense, or only in a limited one; and whether its shores or bed, or both, belong to individuals, or to the public? The cause might be disposed of briefly, but it calls for a somewhat free and full examination, on account of its interest and importance; on account of the fullness with which it has been pre-

sented by counsel, arraying the authorities from all the States upon all sides of the questions involved ; and on account of the state of the authorities ; in which much has been erroneously taken for granted—a bearing given to previously decided cases, which they would not warrant—and unsupported inferences drawn from fair decisions.

We are of the opinion that the plaintiff cannot maintain his action. And in expressing our views, we will consider the following three propositions: First. Although the ebb and flow of the tide was, at common law, the most usual test of navigability, yet it was not necessarily the only one. Second. However the truth may be upon the above proposition, that test is not applicable to the Mississippi river. Third. The common law consequences of navigability, attach to the legal navigability of the Mississippi.

First. Although the ebb and flow of the tide was, at common law, the most usual test of navigability, yet it was not necessarily the only one. The term navigable embraces within itself, not merely the idea that the waters could be navigated in fact, but also the idea of publicity, so that saying waters were public, was equivalent, in legal sense, to saying they were navigable. Yet the navigability in fact, was the leading idea, and was the ground of their publicity. But on the other hand, there are in England and in this country, many arms of the sea, which, though not navigable in fact, are so legally. It is worthy of attention, that the ebb and flow of the tide does not, in reality, make the waters navigable, nor has it, in the essence of the thing, anything to do with it. The fact that certain rivers were accessible, and could be navigated by vessels of considerable burthen, always constituted the substance of the thing. But, as in England, the tide waters, particularly the seas, were by far the most important ; and as all of the rivers of that country, navigable in fact, were affected to a greater or less extent, by the tide ; and as the high and important admiralty jurisdiction was always governed by this criterion, the ebb and flow of the tide became the usual test. The nature of the admiralty, relating as it did, to the high seas, where the king's authority had sole sway, and to the arms of the sea, gave prominence to the tidal ebb and flow, in

legal thought. But there is nothing in nature, or reason, to constitute this the only criterion. *Blanchard vs. Porter*, 11 Ohio 143; 12 How. 454.

In the treatise on the law of waters, by Woolrych, 40 (margin), he divides rivers into public and private. He says: "A public navigable river frequently owes its title to be considered as such, from time immemorial; by reason of its having been an ancient stream; but very many acts of Parliament have been passed, to constitute those navigable rivers, which were not so before. Waters flowing inland, where the public have been used to exercise a free right of passage, from time whereof the memory of man is not to the contrary, or by virtue of legislative enactments, are public navigable rivers. (This is the most unfailing test to apply, in order to ascertain a common right; others have been attempted, and frequently without success." Thus he negatives the idea that none are navigable but where the tide flows. And then he proceeds to show, that all waters are not navigable (in the legal sense) where the tide does flow; and he cites the case of *The Mayor of Lynn vs. Turner*, Cowp. 86, in which it was contended, that a river which flows and reflows, and is an arm of the sea, is, *prima facie*, common to all; and therefore "it was urged that an action on the case could not be sustained against the corporation of Lynn, for the non-repair of a certain creek, because the tide of the sea had been accustomed to flow and reflow therein; consequently, it was said, this non-feasance was punishable by indictment only, because the water must be deemed public. But this argument was treated by the court as a fallacy; for they denied that the flowing or reflowing of the tide constituted a navigable stream; there being many places where the tide flows, which are not navigable; and the place in question might be a creek in the private estate of the corporation." The language of Lord Mansfield, in that case, is emphatic: "How does it appear that this is a navigable river? The flowing and reflowing of the tide does not make it so."

In *Miles vs. Rose*, 5 Taunt. 706, Gibbs, C. J., says that the flowing of the tide, though not absolutely inconsistent with a right of private property in a creek, is strong *prima facie* evidence of its

being a public navigable river; and Heath, J., expresses the same opinion. And in *Rex vs. Montague*, 4 B. & C, 598, in 1825, Bayley, J., says: "The strength of this *prima facie* evidence must depend upon the situation and nature of the channel. If it is a broad and deep channel, calculated for the purposes of commerce, it would be natural to conclude that it has been a public navigation; but if it is a petty stream, navigable only at certain periods of the tide, and then only for a very short time, and by very small boats, it is difficult to suppose that it ever has been a public navigable channel." And Holroyd and Littledale, Justices, concur: 10 E. C. L. 414. And Woolrych, again, makes the following conclusion: "The circumstance, therefore, of the flow and reflow of the tide, is one of the strongest in support of a public right; but so far from being conclusive, we have mentioned a case in which such a test has been found to be fallible. Public user, for the purposes of commerce, is, consequently, the most convincing evidence of the existence of a navigable river," &c. It seems clear, then, that even taking the doctrine of the English books, whilst the flow of the tide became, and was spoken of as the usual test, yet it was not this which constituted a stream navigable, nor was it the only test; and that sometimes even this failed. See Hale's *De Jure Maris*, in 6 Cow. 539.

* * * * *

Second. However the truth may be upon the first proposition, the flow and reflow of the tide is not applicable to the Mississippi, as a test of its navigability. And third: The common law consequences of navigability, attach to the legal navigability of the Mississippi river. The arguments and authorities upon these two propositions, being in a great measure identical, they must be considered together.

The thought has been before suggested, that as a real and virtual test, the tide is a merely arbitrary one, and is not supported by reason; since many waters where the tide flows are not in fact navigable, and many where it does not flow, are so. It is navigability in fact, which forms the foundation for navigability in law; and from the fact follows the appropriation to public use, and hence

its publicity and legal navigability. It is true, that this legality attaches to some waters which do not possess the requisite quality in fact, but this arises from their relation to the high seas, and to admiralty, and from the difficulty of making an hundred exceptions. It is impossible to bring the mind to an approval, when we attempt to apply to the rivers of this country, stretching up to three thousand miles of extent—flowing through or between numerous independent States—and bearing a commerce which competes with that of the oceans—a test which might be applicable to an island not so large as some two of our States; and to streams whose utmost length was less than three hundred miles, and whose outlet and fountain, at the same time, could be within the same State jurisdiction. In England, or in Great Britain, the chief rivers are the Severn, Thames, Kent, Humber, and Mersey; the latter of which is about fifty, and the first about three hundred miles in length, and of this (the Severn) about one hundred miles consists of the British channel. The world-renowned Thames, has the diminutive proportions of two hundred miles. And of even these lengths, not the whole is navigable. Thus, it will be seen, that these chief rivers of good old England, range in extent with our Connecticut, Merrimac, Hudson, Allegany, Monongahela, Cedar, Iowa, and Des-Moines, and bear a proportion of one to twenty, when compared with the greater rivers of this continent.

* * * * *

The courts in the States of Maine, New Hampshire, Connecticut, New York, Maryland, Ohio, Illinois and Mississippi, have adopted the common law rule, with more or less directness and fullness. The cases are very fully collected by the counsel, and we have seen and examined nearly all of them. In the most of those from the northeastern States, the subject is discussed very little; but they simply assume the common law rule as the one to decide by, and look no farther. It is conceived that there is no case in the New England States, which requires comment. In New York, the subject has received a good deal of attention in the cases of *Varick vs. Smith*, 5 Paige, 137; *Same vs. Same*, Ib. 547; *Ex parte Jennings*, 6 Cowen, 537, in a note to which is published a part of Ld. Hale's

Treat. *De Jure Maris*; *Canal Com. vs. The People*, 5 Wend. 447; *People vs. Canal Com.*, 13 Ib. 358; *Canal Appr's vs. The People*, 17 Ib. 571; *Hewlett vs. Pearsall*, 20 Ib. 111; *Pearsall vs. Post*, 22 Ib. 425; *Canal Com. vs. Kempshall*, 26 Ib. 404; *Gould vs. Hudson R. R. Co.*, 2 Seld. 522.

The cases in Pennsylvania, have been cited in the books, on both sides of this question; but it is conceived that there has been a misapprehension of them, in citing them in favor of the old rule. Thus, the American editors of Smith's Leading Cases, in their note to 2d vol. 193, say, that "so far as the tide ebbs and flows, the ownership of the soil to low-water mark, is in the proprietor of the adjoining bank," and cite several Pennsylvania cases, among which are *Hart vs. Hill*, 1 Whart. 124; and *Ball vs. Slack*, 2 Ib. 508. In that State, the courts have recognized the right of several fisheries, as arising from ancient custom and from statute; but they have held no doctrine of a right to low water, any farther than as relating to and connected with, such fishing. Thus *Hart vs. Hill*, was for a direct interruption of the right of a several fishery, and the court say, "and first, a fishery is in the river, and is not the space between high and low water, though the use of that space may be necessary in the use of it, and may be included in the term fishery." It is true that they use general language, which implies more than this, but it is to be taken in reference to the case before them.

In *Ball vs. Slack*, 2 Whart. 508, the reporter's abstract says: "It seems that the owners on the Delaware and Schuylkill, have a right to the land between high and low water, subject," &c. It may be doubted whether even this is warranted by the opinion, but admitting that it is, the law there is distinctly settled to the contrary, in *Carson vs. Blazer*, 2 Binn. 475, and in *Shunk vs. Schuyl. Nav. Co.*, 14 S. & R. 71. Many inaccurate expressions have been used in the cases in that State, relating to fisheries, which have led to confusion, but the subject is much cleared in the two cases above cited. And both Pennsylvania and Connecticut recognize a right, either from statutes or local common law, to build wharves, &c., for commercial purposes. The case of *Chapman vs. Kimball*, 9 Conn.

38, announces the rule to be, that owners on navigable rivers own to high-water mark. They say: "The usage of the owners of land to high-water mark, to wharf out against their own land, has never been disputed. This is our common law." Time will not permit the examination of the remainder of the cases cited in the above note, but it is conceived, with deference, that they do not show such a rule to be established—at least outside of their own State.

The case of *Mullanphy vs. Daggett*, 4 Mo. 343, is not to be cited in this class, for it stands upon the express ground, that the Spanish government granted to the water. And *Browne vs. Kennedy*, 5 Har. & John. 195, is hardly to be ranked here, for the basis of it is the king's grant to the lord-proprietor; which the court considered as carrying the right to the shore, and which the proprietor afterwards granted away. In the above cases, from the most of the foregoing States, the consideration arising from the common law rule, and those connected with it, to which we have before alluded, seem to have carried the minds of the courts, as of course, for there was nothing in their circumstances to awaken the question of the applicability of the old rule. And, besides, the earlier of them set the rule down, before the development of the western country had shown the vast public importance of our greater rivers, as amounting to inland seas. It is also worthy of attention, that these same cases hold, that the rule does not extend to larger bodies of fresh and standing waters, namely, the lakes which are within the limits of New Hampshire. They carry the adjacent owner's right to the water, but not *ad medium*. See *The State vs. Gilmanton*, 9 N. H. 463; *Canal Comrs. vs. The People*, 5 Wend. 447; and Hale's Treat. in 6 Cow. 545, is cited.

But when we approach those States which, while they border upon the great western rivers, have still been held more or less by the common law rule, we are compelled to give very considerate attention. This has been the case with Ohio. The case of *Blanchard vs. Collins et al.*, 11 Ohio, 138, old series, in 1841, if regarded as one of the first settling this question, is certainly not a fully considered one. The common law rule is at once recognized. There

is not a word in relation to the character of that river, the Ohio—nothing in relation to the ordinance of 1787, and its meaning and effect—and nothing concerning the laws and practice in respect to the survey and sale of the public lands. It stands chiefly on the two cases in New York—*The People vs. Platt*, 17 Johns. 195, and *Hooker vs. Cummings*, 20 Ib. 90—and its own case, *Gavitt vs. Chambers*, 14, Ohio, 648. It also relies, partly, upon the cases of *Cooper vs. Smith*, 9 S. & R. 26, and *Shunk vs. Schuylkill Nav. Co.*, 14 Ib. 74, which it claims to teach, that the riparian proprietor owns to the water, but not *ad medium flum*; and thus neither following the common law, nor wholly abrogating it. We conceive that the court gave these two cases a meaning which they do not inculcate.

* * * *

In accordance with this general and strong tendency, of the common law, several States have refused to apply the narrow rule to their large waters. As early as 1810, the Supreme Court of Pennsylvania, in the case of *Carson vs. Blazer*, 2 Binn. 475; took the lead. The case came up upon exceptions taken to a charge to a jury by Chief Justice Tilghman, concerning a right of fishing. He said: "The several acts of assembly declaring these rivers to be highways, and regulating the fisheries in them, are incompatible with the common law right. But the common law principle concerning rivers, even extended to America, would not apply to such a river as the Susquehanna, which is a mile wide, and runs several hundred miles through a rich country, and which is navigable, and is actually navigated by large boats. If such a river had existed in England, no such law would ever have been applied to it. Their streams, in which the tide does not ebb and flow, are small." It appears from the opinion of Brackenridge, J., that the grants sometimes extended to the water, and called for it, and even where they did so, they were held not to go to the middle of the stream; nor did they go to the water, unless the grant was explicit.

This case was followed by *Shunk vs. Schuylkill Navigation Co.*, 14 S. & R. 71, in 1826; *Bird vs. Smith*, 8 Watts, 434; *Union Canal Co. vs. Landis*, 9 Watts, 228, in 1840; all of which recog-

nize the same doctrine. There does not seem to have been advanced in Pennsylvania, a claim to the centre of these large rivers, nor even to the shore. Two of the above cases, arise on claims to the exclusive right to fish with seines in the pools made or kept in order by individuals, founded upon a supposed ancient usage. But the claim of such a right was rejected.

North Carolina, also, in 1828, set aside the common law rule, as inapplicable. And the only thing which gives the riparian owner, in that state, a right down to the water, is the express declaration of their ancient acts of 1715 (or 1765) and 1777, relating to surveys and sales; and their otherwise total exemption from the common law private rights, stands upon the ground that they are declared to be highways, as the acts and laws of the United States have declared other rivers. Tennessee follows the decision in North Carolina, as subject to the same acts of assembly.

In the case of *Cates vs. Wadlington*, 1 McCord, 583 (356 top), in 1822, the Supreme Court of South Carolina, by Nott, J., says, "But that rule (the common law) will not do in this State, where our rivers are navigable several hundred miles above the flowing of the tide." And they say this in close connection with the assertion, that there is no legislative act declaring which, or whether any, of their rivers are to be considered as public or navigable, so that the subject was free from any kind of constraint, except the common law rule.

The subject received more elaborate attention in *The Mayor, &c., of Mobile vs. Eslava*, 9 Porter, 578, in 1840, than in nearly any of the other cases; and it is here viewed with mere reference to the ordinances and laws of the United States, which are scarcely alluded to in any one of the foregoing cases, but without which, we conceive it impossible to reach the merits of the question. The common law rule alone seems to have absorbed the attention, in the consideration of the cases, whilst the treaties, ordinances and laws of the United States, have been overlooked or passed by in silence.

* * * * *

It is now necessary to see how far the matter has been discussed or settled by the federal courts.

Tyler vs. Wilkinson, 4 Mason, 397-400, related to the Pawtucket river, a small river flowing in part of its course between Massachusetts and Rhode Island; but the controversy was between individuals. Judge Story, without any discussion, assumes the application of the common law rule to that part of it which was above the tide water.

Bowman's Devises and Burnly v. Wathen et al., 2 McLean, 376, is cited on both sides of the question, but we think it a strong authority against the application of the common law rule. Judge McLean says: "We apprehend that the common law doctrine as to the navigableness of streams, can have no application in this country; and that the fact of navigableness does in no respect depend upon the ebb or flow of the tide. On navigable streams, the riparian right, we suppose, cannot generally extend beyond high-water mark." The doubt as to the application of this case, as an authority, arises on the next passage, in which he says: "But in the present case, this inquiry is not important. It is enough to know that the riparian right on the Ohio river extends to the water," and that "the proprietor has the right of fishing, of ferry, and every other right which is properly appurtenant to the soil." The doubt is, whether the learned judge means this latter as a proposition holding true of the Ohio generally, or of grants standing, as the one before him did. He may have intended it of the Ohio generally, upon the strength of the cases before cited from that State; but strong against this construction, is the assertion that the proprietor has the right of fishing! Now, no one has ever gone so far as to claim a several fishery in that, or any other of the great western rivers; and the Ohio cases, as well as *Handly's Lessee vs. Anthony*, 5 Wheat. 374, negative such a right; for they hold that as the State of Ohio extends to low-water mark only, of consequence no grant by, or in the State, can extend farther; and the right of a several fishery implies, *ex necessitate*, a title or right *usque filum aquæ*. There is a view which renders Judge McLean's remarks entirely harmonious; that is, considering his last remark as made in reference to the right or title before him. For directly in connection

with the foregoing thought, he proceeds thus: "In coming to this conclusion, we have deemed it unnecessary to look particularly into the laws of Virginia, under which the title in question was derived," &c. "The title of Isaac Bowman (one of the complainants) was derived from the State of Virginia, not only before Indiana was known as a territory, but before the organization of the Northwestern Territory. His rights, whatever they were, can have been in no respect affected by the direct act of the territorial government, or of the State government which succeeded it."

* * * *

We desire to add a passage from the opinion of Chief Justice Taney, in the case of the *Propeller Genesee Chief vs. Fitzhugh*, 12 How. 443, in 1851, in which case was considered the question of the extension of the admiralty jurisdiction of the United States to navigable waters, other than the tide waters. "Now there is nothing," he says, "in the ebb and flow of the tide, that makes the waters peculiarly suitable for admiralty jurisdiction, nor anything in the absence of a tide, that renders it unfit. If it is a public navigable water, on which commerce is carried on between different states or nations, the reason for the jurisdiction is precisely the same; and if a distinction is made on that account, it is merely arbitrary, without any foundation in reason; and, indeed, would seem to be inconsistent with it. In England, the writers and courts always speak of the jurisdiction as confined to tide water. And this definition, in England, was a sound and reasonable one, because there was no navigable stream in the country, beyond the ebb and flow of the tide, nor any place where a port could be established to carry on trade with a foreign nation, and where vessels could enter or depart with cargoes. In England, therefore, tide water and navigable water, are synonymous terms, and tide water, with a few small and unimportant exceptions, meant nothing more than public rivers, as contradistinguished from private ones; and they took the ebb and flow of the tide as the test, because it was a convenient one, and more easily determined the character of the river. At the time of the adoption of our constitution, the English definition was equally

proper here. In the old thirteen States, the far greater part of the navigable waters are tide waters, &c. * * * * The courts of the United States, therefore, naturally adopted the English mode of defining a public river, and consequently the boundary of admiralty jurisdiction. They measured it by tide water. And that definition, having found its way into our courts, became, after a time, a familiar mode of describing a public river, and was repeated as cases occurred, without particularly examining whether it was as universally applicable in this country as in England. If there were no waters in the United States which are public, as contradistinguished from private, except where there is tide, then unquestionably, here as well as in England, tide water must be the limit of admiralty power. And as the English definition was adopted in our courts, and constantly used in judicial proceedings, and forms of pleading, borrowed from England, the public character of the river was in process of time lost sight of, and the jurisdiction of the admiralty treated as if it were limited by the tide. The description of a public navigable river, was substituted in place of the thing intended to be described. And under the natural influence of precedents and established forms, a definition, originally correct, was adhered to and acted on, after it had ceased, from a change of circumstances, to be the true description of public waters."

Judgment reversed.

In the Supreme Court of Ohio, December Term, 1856.

REUBEN H. THURSTON AND THOMAS HAYS vs. WILLIAM LUDWIG.

A verbal agreement, to be effectual as a *waiver, variation, or change* in the stipulations of a prior written contract between the parties, must rest upon some new and distinct legal consideration, or must have been so far executed or acted upon by the parties, that a refusal to carry it out would operate as a fraud upon one of the parties.

Petition in error, to reverse the judgment of the District Court of Crawford county.

The original action was assumpsit, brought by the plaintiffs in

error against the defendant in error, in the Court of Common Pleas of Crawford county, March 17, 1852. The plaintiffs declared on a written contract as follows, viz :

“ This is to certify that Wm. Ludwig agrees to deliver to Thurston & Hays, from 300 to 500 good merchantable stock hogs, none to weigh less than 70 lbs., to be delivered in Delaware, Ohio, from 1st to 5th of March next, for which Thurston & Hays agree to give \$3¹⁰/₁₀₀ per hundred, gross weight, on delivery.

WM. LUDWIG,
THURSTON & HAYS.

Bucyrus, Jan. 13, 1852.”

The defendant pleaded the general issue, with a notice, that, on the trial, he would give in evidence and insist in bar of the action, that after the execution of the contract declared on, and on the same day, to wit, the 13th day of January, 1852, said contract was varied by a verbal agreement between the plaintiffs and the defendant, whereby the plaintiffs, for a good and sufficient consideration, promised to make the defendant an advancement of money on said written contract, before the 5th day of March, 1852, to wit, on the first day of February, of that year; and that in default of such advancement of money, the defendant was discharged from all liability on said written contract; and that the plaintiffs neglected and refused to make such advancement of money to the defendant; whereby the defendant has become discharged from all liability to the plaintiffs on said written contract.

After a trial in the Common Pleas, the cause was appealed to the District Court. And at the August term of the District Court, 1852, the intervention of a jury having been waived, and the cause submitted to the court, the plaintiffs, to maintain the issue on their part, gave in evidence the written contract declared on, and also evidence proving the failure of the defendant to deliver the hogs; that, at the time specified for the delivery, stock hogs, such as the contract called for, were worth at Delaware from \$3⁷⁰/₁₀₀ to \$3⁷⁵/₁₀₀ per hundred weight gross. And it appeared in the evidence, that after the written contract had been executed between the parties on

the 13th January, 1852, the defendant, Ludwig, told the plaintiff, Thurston, that he would expect an advancement of money on the contract, before the delivery of the hogs, insisting that it was customary among stock dealers to do so. To this Thurston replied, that it was not his custom, and that he did not expect to make any such an advance. Ludwig, however, insisted on the advance, and Thurston finally said that he would either go himself or send to Bucyrus, sometime about the first of February, and would then advance to Ludwig \$150 or \$200 on the contract. This parol agreement was not, however, either inserted in the written contract, or reduced to writing. It also appeared in evidence, that plaintiffs, Thurston and Hays, were partners in business in Delaware, Ohio; and that about the last of January, or first of February, after the making of this contract, the son of the plaintiff, Thurston, was sent to Ludwig, to make a contract for the purchase of more hogs, and also to see about the prospect of the delivery of those already contracted for, when Ludwig declined to contract for the delivery of any more hogs, but said that he would have those already contracted for, ready for delivery at the time specified; but said nothing about the advance of money on the contract by Thurston. It also appeared, that about the last of February, Thurston sent a man to Ludwig to make further inquiry about the hogs, and to assist in driving them to Delaware, when Ludwig refused to deliver the hogs, assigning as his reason therefor, that Thurston had not kept his promise to make an advance of money on the contract.

Upon this state of facts, the District Court found for the defendant; whereupon the plaintiffs moved the court for a new trial, on the ground that the finding by the court was against both the law and the evidence in the case, and that the finding should have been for the plaintiffs; but the court overruled the motion, and gave judgment for the defendant; and the plaintiffs took their bill of exceptions, embodying the facts of the case.

It is now assigned for error, that the District Court erred in overruling the motion for a new trial; and also erred in rendering judgment for the defendant.

Peleg Bunker and James R. Hubbell, for plaintiffs.

Stephen R. Harris, for defendant.

The opinion of the court was delivered by

BARTLEY, CH. J.—The single question presented by this case, is, whether the written contract of the parties was altered by a verbal agreement. The written contract expressly provided for payment for the hogs by the plaintiffs, at the time of delivery, which was to be between the first and the fifth of March succeeding the time of the making of the contract, on the 13th of January, 1852. It appears, that immediately after the execution of the written contract, the defendant, Ludwig, insisted that, according to a custom among stock dealers, he ought to have some money in advance; and the plaintiff, Thurston, at first declined, but finally promised the defendant that he would make him an advance of \$150 or \$200 about the first of February. The District Court regarded this verbal promise as a valid alteration of the written contract between the parties, and as creating a condition precedent to the obligation of the defendant to deliver the hogs. Was there error in the action of the court in this regard?

It is well settled, as a general rule, that all parol negotiations between the parties to a written contract, anterior to, or contemporaneous with the execution of the instrument, are to be regarded as either merged in it, or concluded by it. Accordingly, it is held, that parol evidence is incompetent to show terms or conditions at variance with, or in addition to, a written agreement, which the parties agreed to verbally, prior to, or at the time the contract was reduced to writing, but which were not inserted in the instrument. *Powell vs. Edmonds*, 12 East, 6; *Ridgway vs. Bowman*, 7 Cush. 268; *Small vs. Quincy*, 4 Greenl. 497; *Chitty on Contracts*, 110. And it appears to be equally well settled, that, *subsequent* to the execution of a written contract, it is competent for the parties, by a *new contract, although not in writing*, either to abandon, waive, or annul, the prior contract, or vary, or qualify the terms of it, in any manner. And where the verbal contract only changes or modifies some of the terms of the original contract,

it embraces, by reference, all the written stipulations of the original undertaking, and is to be proven by the verbal agreement taken in its connection with the written contract. But where a written contract is thus either totally abandoned and annulled, or simply altered or modified in some of its terms, it is done, and *can only be done*, by a distinct and substantive contract between the parties, founded on some *valid consideration*. And among the multifarious verbal negotiations of parties in reference to their mutual stipulations in written contracts, to draw the line of distinction between those which are valid and effectual as alterations or modifications of the terms of written contracts, and those which are mere *nuda pacta*, and, therefore, of no binding validity, requires, sometimes, much nicety of discrimination. And it is to be regretted that the reported adjudications bearing upon this distinction, are not all entirely perspicuous and consistent. The general language employed by some of the elementary authors touching this subject to the effect that the parties to a written contract, may by parol agreement waive, abandon, or discharge a written contract, in whole or in part, or alter or modify any of its terms, has led some to the inconsiderate conclusion, that it could be done without any new and valid consideration. This, however, is a mistake. A valid consideration is an essential and indispensable element in every binding agreement. If a written contract be altered by verbal agreement, such agreement must have the essential ingredients of a binding contract; and although it may have reference to, and, indeed, embody the terms of the written contract, yet it must be founded on a new and distinct consideration of itself.

When the verbal agreement of parties amounts to a waiver or discharge of mutual stipulations in a written contract, either in whole, or in part, the discharge of each by the other, from the obligations of the contract, may furnish a sufficient consideration. Forbearance, or extrinsic considerations, may exist to furnish sufficient legal foundation for an alteration, by verbal agreement, of the stipulations in a prior existing contract. An agreement by one person to discharge another from the obligations of a written contract, as a matter purely *ex gratia* and in the nature of a donation, would

be of no binding validity as a mere *executory agreement*, and to be effectual, must be fully executed by an actual release, or surrender of the contract in writing. There is a class of cases, however, where a written contract may be altered or modified by a mere verbal agreement of the parties, which, at its inception, or as a mere executory agreement, would have no binding effect, yet by being acted upon by the parties until it would work a fraud or injury to refuse to carry it out, becomes binding and effectual as a contract. But a verbal agreement to have the effect to alter or modify the terms of a prior written contract, must be a valid and binding contract of itself, resting upon some *new and distinct consideration*. And it cannot be supported on the supposition that it is founded on the continuation or extension of the consideration of the prior or written contract, which was complete of itself, and so far as it went, fixed the rights of the parties.

In the case of *Gross vs. Nugent*, 5 Barn. and Adolph. 65, in which the doctrine, that a written contract may be annulled, or its terms altered by subsequent verbal contract, is laid down by Lord Denman in the broadest language, it is not pretended that it can be done, otherwise than by a "*new contract*," which, of course, must be founded on a new and distinct consideration.

The case of *Lattimore vs. Harsen*, 14 Johns. 330, was a case in which the plaintiffs, in a suit to enforce a verbal contract, had subjected themselves to a penalty for the non-fulfilment of a written contract; and finding the contract a hard one, chose to pay the penalty rather than perform the contract, and thereupon, the other party preferring the fulfilment of the contract to the payment of the penalty, verbally agreed that if the plaintiffs would go on and perform the work, they should be paid therefor whatever it was reasonably worth, with which the plaintiffs complied. Here was a new and distinct contract, and founded upon a new and distinct consideration. The performance of the work under the first contract was abandoned, and being more beneficial to the defendant even than the penalty incurred, furnished a good consideration for the new contract. And the court place the decision strictly on the ground of a *sufficient new consideration*. Substantially to the same

effect is the case of *Munroe v. Perkins*, 9 Pick. 298, where one, by an instrument under seal, agreed to erect a building for a fixed price, which proved to be an inadequate compensation, and having performed part of the work, refused to proceed further, whereupon the obligee promised, that if the party would go on and complete the work, he should be paid for his labor and materials what they were reasonably worth, and the work was done. Here the employer had a right of action on the written contract which was broken; but he chose, in view of the benefit of the work, to make a new contract for its performance.

And the case of *Cummings vs. Arnold*, 3 Metc. 486, stands upon the same principle; also the case of *Dearborn vs. Cross*, 7 Cow. 48; *Randolph vs. Perry*, 2 Porter (Ala. R.) 376; *Perrine vs. Cheesman*, 6 Halst. 177.

There is a class of cases, where parol evidence has been admitted in connection with written evidence, where it is apparent from the writing itself, that it does not embody the whole contract of the parties, or where the verbal agreement is not inconsistent with, but supplementary to the written agreement. The case of *Jeffry vs. Walton*, 1 Starkie's R. 213, falls within this class, where in the hire of a horse, a written stipulation on a card existed, merely regulating the time of hiring and the rate of payment; parol evidence was admitted, showing additional terms in the agreement. Also *Wallace vs. Rogers*, 2. N. Hamp. 506, where articles were sold accompanied by a bill of parcels fixing the quantity, price, etc. *Hoggins vs. Plympton*, 11 Pick. 99; and *Brodford vs. Manly*, 13 Mass. R. 139, are to the same effect. To this class, also belongs the case of *White vs. Parkin*, 12 East, 582. The principle of these cases must be distinguished from that which is applicable to the case before us.

There is a still more extensive class of cases, in which parol evidence has been admitted to vary the terms of a prior written contract, where the verbal agreement, as a mere executory contract, would, at its inception, be wholly ineffectual, but which acquires validity and becomes binding from having been executed or acted on by the parties. Under the rule in this class of cases, oral evidence is admissible to show, that by subsequent agreement, the time

for the performance has been enlarged or the place for the performance changed from that fixed by the written contract. Greenl's. Ev. vol. i. sec. 304. *Keating v. Price*, 1 Johns. Cases, 22.

But an oral agreement to enlarge the time, or change the place of performance fixed by a written contract, must be subsequent to the time of the execution of the latter, and constitute an independent agreement of itself, acquiring its binding effect, either from an existing consideration at the time, or from having been acted upon by the parties, until it could not be disregarded by one party without working an injury to the other party. In the case of *Lefevre vs. Lefevre*, 4 Sergeant & Rawle's Rep. 241, it was held that parol evidence was admissible to prove, that after the execution of a deed conveying a right to a water-course through the granted land, by courses and distances, a verbal agreement was entered into between the parties for their mutual accommodation, altering the route of the water-course. And this evidence was admitted expressly on the ground, that the parties had acted on the verbal agreement, so that the original contract could no longer be enforced without a fraud upon one party. To the same effect is *Crossman vs. Fuller*, 17 Pick. R. 174; also *Richardson vs. Cooper*, 25 Maine Rep. 450. *Bailey vs. Johnson*, 9 Cow. 115. *Lynd vs. Beech*, 7 Howard's Pr. Rep. 113.

Upon a full review of the whole subject, it appears to be well established, that a verbal agreement, to be effectual and binding as an alteration of the express terms of a prior written contract between the parties, must be supported by a new and valid consideration. And that a mere executory contract, of the kind to constitute an exception to this rule, must have been acted upon so far, that a refusal to carry it out would work a fraud on one of the parties.

The application of this view of the law to the case before us, removes all difficulty in making a satisfactory disposition of it. The verbal promise of Thurston was manifestly unsupported by any valid consideration, as disclosed by the evidence. The parties had just settled the terms of their written contract, and completed the execution of it, by which Ludwig had bound himself to deliver the

hogs, in consideration of the undertaking of Thurston & Hays to pay the stipulated price, at the time of delivery in March. The time and place of payment were fixed by the express terms of the written contract. The custom of the country, if any such actually existed as that spoken of by Ludwig, could not have affected the express terms of the written contract. What conceivable consideration can be assigned to support Thurston's promise as a binding obligation? Ludwig had not refused a compliance with the written contract which he had just executed. Why should Thurston, except as a mere matter of accommodation, or favor, resting in his own discretion, promise an advance of \$150 or \$200 to Ludwig, one month before the stipulated time of payment, and that too, without security, when the terms of his written contract secured him against any such a risk? As a consideration for this promise, Ludwig was not required to deliver any more hogs, nor of a better quality, nor at any other time or place, nor at a less price, nor wait any greater length of time for the balance of the money. In short, Thurston was to take nothing for the fruits of his promise, to which he was not entitled, and which he had not a right to expect at the time, from the performance of the written contract by Ludwig. The proposed advance, therefore, so far as the evidence discloses it, was a naked promise of an accommodation or favor, resting in the option of Thurston; and it appears to have been so treated by the parties at the time. The written contract which had just been signed, was before them when the promise of the advance was made. If intended as a stipulation in their contract, why was it not inserted or endorsed on the contract at the time? Why did Ludwig take his duplicate copy of the contract, at the very time of the promised advance, and separate from Thurston without a change in the writing, which he carried away with him as the evidence of the agreement? And it is not made to appear, that Ludwig ever made any request of Thurston for the advance. On the contrary, when Thurston, about the first of February, and near the time when the promised advance was to have been made, sent his son to Ludwig to inquire about the delivery of the hogs, instead of requesting the advance, he did not even inquire about it, but said that he had the hogs, or the most of

them, and would be ready to deliver them at the time specified. If the solemn stipulations of a written contract could be altered by a mere naked verbal promise under such circumstances, that certainty, which is the greatest guaranty of safety among business men, arising out of written contracts, would be greatly weakened. And evidence of loose and inconsiderate conversations, often not fully understood or accurately remembered, would be resorted to in many cases, to show waivers or variations in the stipulations of parties, with a view of avoiding the binding obligations of written contracts.

We are unanimous in the opinion that there was error in the proceedings of the District Court.

Judgment reversed, and cause remanded.

In the Supreme Court of Vermont.

RUSSELL T. NOYES vs. JOHN SMITH AND WILLIAM R. LEE.¹

1. A master is bound to exercise proper care and diligence in the selection of the agencies and instruments with or upon which he employs his servants; and, if he fail to do so, he will be liable to the servant for any injuries he may sustain therefrom.
2. The declaration averred that the plaintiff was hired by the defendants, to have the charge of, and conduct and run an engine, and that by virtue of said employment, it became the duty of the defendants to furnish an engine that was well constructed and safe, &c., but that they carelessly and wrongfully furnished an insufficient engine; that the insufficiency was unknown to the plaintiff, and "but for want of all proper care and diligence, would have been known to the defendants;" and that, while the plaintiff was in the careful and prudent use of said engine, it exploded on account of said insufficiency, and injured the plaintiff, &c. *Held*, on demurrer, that the declaration disclosed a sufficient cause of action.

Action on the case. The declaration was as follows:

"In a plea of the case, whereupon the plaintiff declares and says, that heretofore, to wit, on the 11th day of November, 1853, and for a long time before that time, the defendants were in the possession of the Vermont Central Railroad Company's track, and of all engines, locomotives, cars, and other furniture, which had pre-

¹ 2 Williams' Rep. We are under obligation to the learned reporter, for this case.

viously belonged to the Vermont Central Railroad Company, a corporation chartered and organized by and under a law of the legislature of the State of Vermont, and the defendants on that day, and long before, were and had been common carriers of freight and passengers on said road; and that on the 11th day of November, 1853, the plaintiff was in the employ of the defendants, hired by them, as an engineer, to have charge of and conduct and run an engine on said road, for the purpose of transporting passengers and freight on said road, and had for a long time before been such hired servant of the defendants, in the capacity of engineer,—and that by virtue of said employment of the plaintiff by the defendants, as aforesaid, it became and was the duty of said defendants to furnish an engine for the plaintiff to conduct and run, as it was his duty to do, that was well constructed and safe to the engineer, with the use of proper skill on his part. Yet the defendants, disregarding this duty, to wit, on the 11th day of November, 1853, carelessly and wrongfully gave to the plaintiff to use and conduct in drawing freight on said road, an engine which had not before been conducted by or known to the plaintiff, which was insufficiently stayed and bolted around the fire box, and insufficient in divers parts; inso-much that it greatly endangered the life of the engineer who ran it,—all which was unknown to the plaintiff, and all which, but for want of all proper care and diligence, would have been known to the defendants. And the plaintiff avers that while in the careful and prudent use and management of said engine, on his part, on the 11th day of November, 1853, on said road, said engine exploded from the imperfection and insufficiency aforesaid, and by the explosion, the plaintiff was so torn and scalded, that he hitherto, since that day, hath been and always will be a cripple, and wholly unable to work, and hath been put to great expense for doctors and nurses, to wit, \$1,000, whereby and by reason of all which, an action hath accrued to the plaintiff to have and recover his said damages, and all he hath lost from the causes aforesaid, to his damage," &c.

To this declaration the defendants demurred, and the county court, September term, 1855,—POLAND, J., presiding,—adjudged the declaration insufficient. Exceptions by the plaintiff.

P. Dillingham and H. Carpenter, for the plaintiff.

Peck and Colby, for the defendants.

The opinion of the court was delivered, at the circuit session in September, 1856, by

ISHAM, J.—This case comes before the court on a general demurrer to the declaration. The plaintiff, it is averred, was injured by the explosion of a locomotive engine, on which he was employed by the defendants, as engineer. It is admitted that the engine was insufficiently stayed or bolted around the fire box, and that it was also insufficient and unsafe in other respects, but that both parties were ignorant of those defects, and had no notice in fact that it was in an unsafe or insecure condition. That fact is directly averred in relation to the plaintiff, and the defendants are not charged with any such notice by any averment in the declaration. It is averred, however, that these defects would have been known to the defendants, but for the want of all proper care and diligence on their part. The inquiry arises, whether the facts stated are sufficient to enable the plaintiff to recover; it being admitted that the plaintiff was in the exercise of proper skill and diligence when he was injured.

The general rule seems to be well settled by the authorities, that there is nothing growing out of the mere relation of master and servant that raises the duty stated in the declaration. When there is *no actual notice of defects* in an engine of that character, and *no personal blame* exists on the part of the master, there is no implied obligation or contract on his part that the engine is free from defects, or that it can safely be used by the servant. The law imposes no such obligation. There are risks and dangers incident to most employments, and, especially is this true, in relation to such services as those in which the plaintiff was engaged. Those risks the parties have in view when engagements for services are made, and in consideration of which the rate of compensation is fixed. In all engagements of that character, the servant assumes those risks which are incident to his service, and, as between himself and his master, he is supposed to have contracted on those terms. If

an injury is sustained by the servant, in that service, it is regarded as an accident, a mere casualty, and the misfortune must rest on him. That is the doctrine, and the extent of the cases, to which we were referred by the defendant's counsel. In the case of *Priestly vs. Fowler*, 3 Mees. & Welsb. 1, it was held that the master was not liable to his servant for an injury sustained by him, from the breaking down of an overloaded van. Lord Abinger in that case observed, that "from the mere relation of master and servant no contract, and therefore no duty, can be implied on the part of the master to cause the servant to be safely and securely carried, or to make the master liable for damage to the servant, arising from any vice or imperfection unknown to the master, in the carriage or in the mode of conducting or loading it." The same doctrine is sustained in *Seymour vs. Madox*, 5 Eng. L. & Eq. 265, and in the case of *Couch vs. Steel*, 24 Eng. L. & Eq. 77. The principle, which is now well settled in England and this country, "that a master is not liable to his servant for an injury occasioned by the negligence of a fellow servant, in the course of their common employment," is founded upon the same reason. The liability of one servant to be injured by the carelessness of another, is a risk which the servant has assumed, as an accident to his employment, and for which the master is not responsible. This general rule, however, has no application to either of those cases when there has been *actual fault or negligence* on the part of the master, either *in the act from which the injury arose, or in the selection and employment of the agent which caused the injury*. The case of *Couch vs. Steel*, above cited, recognizes both the general rule and that qualification. In that case it was held, that, as there was no *actual knowledge* of the defective condition of the ship, and *no personal blame* was imputed to the owner, a seaman could sustain no action for an injury sustained in consequence of its unsafe condition. The language of the court implies, that, had there been *actual knowledge* or *if personal blame* had otherwise been imputed to the ship-owner, a liability would have existed. The case of *Hutchinson vs. Railway Company*, 5 Wels., Hurls. & Gord. 352, is a strong illustration of the principle. In that case, Alderson, B., after recognizing the

general rule, that a master is not, in general, responsible to one servant for an injury occasioned to him by the negligence of a fellow servant, observed, that "this must be taken with the qualification that the master shall have taken due care not to expose his servant to unreasonable risks. The servant," he observed, "when he engages to run the risks of his service, including those arising from the negligence of fellow servants, has a right to understand that the master has taken reasonable care to protect him from such risks, by associating him only with persons of ordinary skill and care." There can be no doubt in relation to the doctrine of those cases, or the general principles on which they are founded. The master, in relation to fellow servants, is bound to exercise diligence and care that he brings into his service only such as are capable, safe and trustworthy, and for any neglect in exercising that diligence he is liable to his servant for injuries sustained from that neglect. It is not necessary that he should know that they are unsafe and incapable. It is sufficient that he would have known it, if he had exercised reasonable care and diligence. The same doctrine is sustained in this country. 1 Am. L. C. 620; 5 Wels., Hurls. & Gord. 357, note; *Coon vs. U. & S. Railroad Co.*, 6 Barber, 231. There is no distinction in principle between those cases and the one under consideration. Upon the facts admitted by this demurrer, whatever may be the agent which the master brings into his service, whether animate or inanimate, the master is bound to exercise care and prudence that those in his employment be not exposed to unreasonable risks and dangers;—and the servant has a right to understand that the master will exercise that diligence in protecting him from injury, and also in selecting the agent from which it may arise. It is only such injuries as have arisen after the exercise of that diligence and care on the part of the master, that can properly be termed accidents or casualties, which the servant has impliedly agreed to risk, and for which the master is not liable. The doctrine is not controverted, that the defendants would be liable to the plaintiff for the injury he has sustained, if they had had notice in fact of the defective condition of the engine. It was so expressly decided in the case of *Keegan vs. Western*

Railroad Corporation, 4 Selden, 175. There is no propriety, therefore, in saying that the defendants may be relieved from that liability by a want of such knowledge, when it has arisen from their gross neglect; for the neglect is gross, when the fact is, as is admitted by the demurrer, that *but for the want of all proper care and diligence, the unsafe condition of the engine would have been known to them*. We think, upon the facts admitted by the demurrer, the plaintiff can sustain this action, and that the declaration is sufficient.

The judgment of the county court must be reversed, and judgment rendered for the plaintiff.¹

In the District Court of Philadelphia.

LEECH vs. SHANTZ.

1. To render a transfer of personal property valid against creditors, it was formerly held that there must be an immediate, open and exclusive possession on the part of the transferee; but according to the more recent authorities the character of the sale may be investigated as a matter of fact, and its honesty and fairness determined by a jury.
2. *Dunlap vs. Bournonville*, 26 Penn. S. R. 72, and *McClure vs. Young*, 2 W. & S. 147, cited and relied upon.

The opinion of the court, in which the facts appear, was delivered by

STROUD, J.—From the time of *Clow vs. Woods*, 5 S. & R. 275, to *McVickar vs. May*, 3 Penn. S. R. 224; the first having been decided in 1819, the second in 1846—it was held again and again, that it was necessary, to render a transfer of personal property valid against creditors, that it should be attended with an immediate, open, and exclusive possession on the part of the transferee. See particularly, *Cunningham vs. Neville*, 10 S. & R. 201; *Babb vs. Clemson*, *ibid.* 419; *Streepe vs. Eckert*, 2 Whart. 302; *Carpenter vs. Mayer*, 5 Watts, 483; *Hoffner vs. Clark*, 5 Whart. 545; *McBride vs. McClelland*, 6 W. & S. 94. Indeed, a year after the decision of

¹ Consult 2 Selwyn's N. P., tit. "Master and Servant," 7th Am. Ed., Phila., 1857.

Mc Vickar vs. May, the old doctrine was re-asserted and re-affirmed in the fullest manner. *Cadbury vs. Nolen*, 5 Penn. S. R. 320.

But this doctrine no longer obtains. What was formerly a matter of law—to be determined by the court—is now regarded as a question of fact, in most cases, to be submitted to a jury. *Dunlap vs. Bournonville*, 26 Penn. S. R. 72, is the last reported case on the general subject. It presented on the trial a state of facts so clearly at variance with the policy of the law, not only as it was formerly held to be, but also as it was supposed it yet remained, that the president of the court before whom the cause was tried nonsuited the plaintiff, and his opinion was fully agreed to by the whole court on the motion to set aside the nonsuit. In the Supreme Court the judgment was reversed.

But in the opinion of the Supreme Court, in *Dunlap vs. Bournonville*, the judge who delivered it, says: “A mere formal or symbolical delivery will not avail, when an actual one is reasonably practicable, and such is its character where the real control is retained by the vendor, or immediately resumed by him.” And *McClure vs. Young*, 2 W. & S. 147, is referred to as rightly decided, and as furnishing an illustration of the distinction which still existed on this subject.

In *McClure vs. Young*, a yoke of oxen which had formerly belonged to Pettigrew were found in his possession, and seized by a constable (Young), under an execution against him. It was proved on the trial that Pettigrew brought the oxen to the place where McClure was, and there agreed to sell them to McClure for a sum of money, which he agreed to pay. About an hour after the purchase and delivery of the oxen to McClure, he agreed to let Pettigrew take and use them until he (McClure) should want them again. The Supreme Court held, that upon this evidence there was no question to be left to the jury, but the court was bound to consider it as a question of law, and that the transaction was to be regarded as a fraud per se.

The evidence in the case now before us seems to bring it within the principle of *Young vs. McClure*, as understood and explained in *Dunlap vs. Bournonville*. A mule, one of three, belonged to

Shaffer. Shaffer used them in drawing a boat on the Schuylkill canal. Leech obtained a judgment against Shaffer for \$127; issued an execution on which the sheriff seized on the three mules. The seizure of the mules was communicated to Shaffer, then in this city. He went to the Falls of Schuylkill, where Shantz resided, and agreed to sell one of the mules to him for \$100. Leech paid him the money, the mule being at the time in the custody of the sheriff at Reading. Shaffer having obtained the remainder of the money from some other source, gave the whole to his driver, who had come down to the Falls of Schuylkill, and he took it to Reading and settled with the sheriff, who thereupon gave up the mules to the driver. After the lapse of more than a week, the mules, drawing the boat, were brought down to the Falls of Schuylkill. Leech and Shaffer were there at the time. Shaffer took Leech to the stable where the mules were, and pointing out the mule which he had sold to Leech, said: "This is your mule." Leech took the mule and ran him out on the road, and immediately brought him back. He then said to Shaffer, "Can you do without the mule?" Shaffer said, "Not well." Leech replied, "Well, you can keep him, and pay me hire for it."

A few weeks afterwards, Shantz having obtained a judgment in this court, issued an execution, placed it in the hands of the sheriff, who thereupon seized the mule which had been sold to Leech. The usual course was then pursued by the sheriff, Leech having claimed the mule as his property, and an issue directed by the court, pursuant to the sheriff's interpleader act. The evidence above stated was given on the trial of this issue, when having heard the whole which the plaintiff offered, I directed a nonsuit. The application before us is to set aside this nonsuit on the authority of *Young vs. McClure*, which is distinctly recognized, as before stated, in *Dunlap vs. Bournonville*. We think the nonsuit was proper, and the motion of the plaintiff should be dismissed.

Motion dismissed.

In the Supreme Court of Pennsylvania, June, 1857.

HENRY S. MOTT ET AL. CANAL COMMISSIONERS vs. THE PENNSYLVANIA
RAILROAD COMPANY ET AL.

1. A State Legislature, in the absence of any express constitutional authority, has no power to sell, surrender, alienate, or abridge, any of the rights of sovereignty, such as the right of taxation, so as to bind future legislatures; and any contract to that effect is void.
2. So much of the Act of the Legislature of Pennsylvania, passed May 16, 1857, authorizing the sale of the Main Line of the Public Improvements of that State, as provides "that if the Pennsylvania Railroad Company shall become the purchaser," they shall pay in addition to the purchase money at which it (the Main Line) may be struck down, the sum of \$1,500,000, in *consideration* whereof the said Railroad Company and the Harrisburg Railroad Company shall be discharged by the Commonwealth *forever* from the payment of all tonnage taxes, and all other taxes whatever, "except for school, city, county, borough, and township purposes," declared unconstitutional and void: and an injunction granted to prevent the same from forming part of the terms of the sale.
3. The act in question provided that the sale should be made by the Governor; held that as this was not part of his official duty as the Executive of the State, but merely ministerial, the injunction might issue against him.
4. The holders of the State Loan, whether or not having a specified lien on the tolls of the Public Works, have no right to object to a sale thereof by the State.

The opinion of the court was delivered by

LEWIS, C. J.—Three bills in equity have been filed, in each of which a motion is made for an injunction to prevent the sale of the Main Line of the Public Improvements of the State, under the Act of Assembly of May 16, 1857. These motions draw into consideration the rights of the Canal Commissioners, of the State creditors, of the tax payers of the Commonwealth, and of the stockholders of the Pennsylvania Railroad Company, to interfere in the great question involved. On all the questions about to be decided, I proceed to deliver the unanimous opinion of the whole court.

Although there is some difference in our reasons for denying to a dissenting stockholder who is offered compensation for his stock by the terms of the act, the preliminary injunction asked, we all

agree in refusing his motion. His rights are to be determined on the final hearing.

We do not consider it necessary to express any opinion on the question whether the holder of a certificate of State loan has such a pledge of the tolls on the State canals and railroads as could be enforced in a court of justice. Conceding, for the purposes of the present motion, that he has such a pledge, we are nevertheless of the opinion that the right of a pledgee extends no further than to require a sale of the thing pledged, and an application of the proceeds to the payment of his claim. This is what the act of Assembly proposes to accomplish. It is what a court of equity would do, under the circumstances disclosed, if the controversy were between private individuals. But the Legislature has the right to prescribe *remedies* and change them at pleasure, so that the *rights* of the parties are not materially impaired. We are perfectly satisfied that the rights of the State creditors will not be impaired by a fair public sale of the Main Line to the highest and best bidder, and the application of the proceeds to the payment of the State debt. On the contrary, we are bound to presume, from the evidence before us, that such a proceeding will be highly beneficial to the creditors of the State. It will reduce the amount of the public debt, and render the residue more secure. We have no right to presume that the Works will be sold for less than their value. The creditor has therefore no case for relief on the footing of the pledge of the tolls on the Public Works.

But the Canal Commissioners, the tax payers and the creditor, object to a contract of sale under which the right to punish the purchasing corporation for misuse or abuse and the right to tax the Pennsylvania Railroad Company for State purposes and another company for tonnage is forever extinguished. It is alleged that the Legislature have no constitutional authority to bind succeeding Legislatures in these particulars. If such a contract be unconstitutional and void, the Canal Commissioners are in the line of their duty in suggesting this objection to the court, and if the court should hold the act of Assembly void, it would be the duty of the commissioners, as faithful agents of the State, entrusted with the custody

and management of the works, to retain possession of them for the use of the Commonwealth, regardless of the unauthorized attempts to deprive the public of their rights. If the Legislature have no right to release the means on which the State and her creditors must rely for the payment of her public debt, any creditor whose security is about to be thus impaired, has a right to be heard in opposition to the measure proposed. The tax-payers, whose burthens will be necessarily increased by releasing from taxation any portion of property liable to contribute to the payment of the public debt and the expenses of government, have also an interest in the question, and of course have a right to be heard.

A judgment of ouster against a corporation, duly put in execution, works its dissolution. According to the ancient common law, where there is no statute provision to the contrary, upon the civil death of a corporation all its real estate remaining unsold reverts back to the original grantors and their heirs. The debts due to and from the corporation are all extinguished. Neither stockholders nor the directors nor trustees can recover debts or be charged with them in their natural capacity. All the personal estate vests in the Commonwealth. 2 Kent's Com. 307; 1 Blacks. Com. 484. But under the modern rule of equity jurisprudence, the severity of the common law in this respect is greatly mitigated, and it is held that it is the *franchise*, and not the property of the corporation that is forfeited by a judgment of ouster, and that the property of the corporation is a trust fund for the payment of debts and distribution among stockholders. *Wood vs. Summer*, 3 Mason's Reports, 309; *Adair vs. Shaw*, 1 Sch. and Lefr. 261; *Mumma vs. The Potomac Company*, 8 Peters, 281; *Stainton vs. The Carron Company*, 23 L. & E. 315; *Travis vs. Milne*, 9 Hare, 141; *Bacon et al. vs. Robertson et al.*, 18 How. U. S. Rep. 480. The 15th section of the act of 16th May, 1857, enables the Legislature, at their election, after judgment of ouster, to revoke the privileges of the corporation, and to take the roads and canals for public use, giving full compensation to the stockholders. This provision does not vary very materially from the rule which equity would adopt, independent of the act of Assembly. It is no release of the punishment for misuse or

abuse. Nor is it a release of the eminent domain under which the corporation may be repealed, without either abuse or misuse, whenever the public interest requires it, on giving just compensation to the stockholders. The word "may," as applied to the action of the Legislature in this respect, is not to be construed as "shall" or "must." If the construction were doubtful, the doubt must be resolved in favor of the State. A corporation can never claim a privilege against the State without showing that it is clearly entitled to it by the terms of the charter. There is nothing in this section which binds the Legislature to make "full compensation to the stockholders." That is only to be done if the Legislature should, by legislative act, revoke the privileges granted; but there is no obligation, on their part to pass any act of revocation. If this should not be done, the judgment of ouster, with all its legal and equitable incidents, would remain in full force. There is, therefore, no release of the right to punish for misuse or abuse, nor any release of the eminent domain in the provisions contained in the 15th section of the act of Assembly.

We now come to the vital question involved in these applications. The act of Assembly of 16th May, 1857, makes provision for a public sale, and, for the purpose of inviting competition, directs that public notice of the time and place be given in one or more newspapers of extended circulation, published in the cities of Philadelphia, Pittsburg, Washington, Boston, New York and in the borough of Harrisburg. It authorizes "any person or persons, or railroad or canal company now incorporated, or which may hereafter be incorporated under the laws of this Commonwealth, to become the purchasers for any sum not less than seven million five hundred thousand dollars." But there is a *proviso* in the 3d section, which declares that "if the Pennsylvania Railroad Company shall become the purchasers at the said public sale or by assignment, they shall pay, in addition to the purchase money at which it may be struck down, the sum of one million five hundred thousand dollars, and, *in consideration thereof*, the said railroad company, and the Harrisburg, Mount Joy and Lancaster Railroad Company shall be discharged by the Commonwealth *forever*, from the payment of

all taxes upon tonnage or freight carried over said railroads, and the said Pennsylvania Railroad Company shall also be released from the payment of all other taxes or duties on its capital stock, bonds, dividends or property, except for school, city, county, borough, or township purposes." The amount of taxes proposed to be released is beyond calculation. It can only be conjectured. It would be greatly increased by the tax which would of course be levied on the property about to be sold to the company. Judging from the increase during the last five years, and the constant augmentation of commerce and travel along the route, it would seem reasonable to believe that in five years from this time it would be double its present amount. But conceding that the tax to be released will hereafter amount to no more, per annum, than the sum paid in 1856, the amount, according to the admission of the railroad company itself, would be \$280,739 21 per annum forever. This sum is more than equal to the interest on \$5,600,000 at 5 per cent., the rate to be charged to the purchasers. In other words, the act of Assembly proposes to give to the railroad company a consideration equal to \$5,600,000 for \$1,500,000, and thus to give that company an advantage equal to \$4,100,000 over every other bidder at the sale. By means of this privilege, the Pennsylvania Railroad Company may drive from the field of competition all other bidders. It is essential to every fair public auction, that all the bidders shall stand upon an equal footing.

If the object had been to make a fair sale of this portion of the State revenue, it might have been evinced by a provision for the transfer of it to the highest bidder, without any distinction in favor of any one. But this was not done. The extraordinary *proviso* in favor of the Pennsylvania Railroad Company, is partial, and entirely repugnant to the general intent of the act, and if allowed to stand, the sale under it will furnish the most magnificent exhibition of a "*mock auction*" that the world has ever witnessed. We rejoice to say that the highly respectable and upright officers of the corporation disclaim, in the most solemn manner, under oath, all agency in procuring the enactment in question.

But has the Constitution conferred upon the Legislature the author-

ity to extinguish, *forever*, by bargain and sale, the power to raise revenue for the support of the government? All free governments are established by the people for their benefit, and the powers delegated are to be exercised for their common good, and not, under any circumstances, to be sold or destroyed, so long as the nations establishing them have the physical power to maintain their independence. Individuals cannot subsist without food. Deprive them of the "means whereby they live," and you destroy them as certainly as if you did it by shedding their blood. The necessities of governments are as great as those of individuals. No government can exist without revenues to defray its expenses and support its officers and agents. The revenue is the food indispensable to its existence. Deprive it of this and you strip it of all power to perform its duties, bring it into contempt by its helplessness and uselessness, and ultimately destroy it as effectually as if it were overturned by domestic violence, or subjugated by the conquest of a foreign foe. Government is but an aggregation of individual rights and powers. It has no more right to commit political suicide than an individual has to destroy the life given by his Creator. Contracting away the taxing power in perpetuity tends, as we have seen, inevitably to the destruction of the government. If twelve or twenty millions of taxable property may be released to-day, one hundred millions may be released to-morrow; and, the principle being established, the process might go on until all power to raise revenue was gone. If this did not destroy the government, it would result in something infinitely more dangerous to the liberties of the people. It would make it the servile dependent of the wealthy corporation or individuals to whom it contracted away its means of support. Although the taxing power is an incidental one, to be exercised only as the necessary means of performing governmental duties, it is nevertheless a branch of the legislative power, which always in its nature implies not only the power of making laws, but of altering and repealing them as the exigencies of the State and circumstances of the times may require. Rutherford's Institutes of Natural Law, b. 3, ch. 3, s. 3. If one portion of the legislative power may be sold, another may be disposed of in the same way. If the power to raise revenue may be sold

to-day, the power to punish for crimes may be sold to-morrow, and the power to pass laws for the redress of civil rights may be sold the next day. If the legislative power may be sold, the executive and judicial powers may be put in the market with equal propriety. The result to which the principle must inevitably lead, proves that the sale of any portion of governmental power is utterly inconsistent with the nature of our free institutions, and totally at variance with the object and general provisions of the constitution of the State. It may be urged that we must confide in the fidelity of the Legislature, and that there is every ground for hope that they would not carry such measures to an unreasonable length. This is no answer to the argument. It is a question of constitutional authority and not a case of confidence at all. Limitations of power established by written constitutions have their origin in a distrust of the infirmity of man. That distrust is fully justified by the history of the rise and fall of nations.

But, conceding that this practice will not be carried so far as to destroy the government, is there any warrant for it to the extent to which the act of Assembly proposes to go in the present case? It was held by this court, in *Hood's Estate*, 9 Harris, 114, that "the duties of sovereign and subject are reciprocal, and the person who is protected by a government in his person or property, may be compelled to pay for that protection. As taxes are to be assessed for the sole purpose of supporting the government, the propriety of exacting them, the persons and property to be made liable, and the rules for their assessment and collection are to be determined by its authority. It is, however, a rule of the public law, founded on a principle of justice which no government can disregard without violating the rights of its citizens, that taxes shall be assessed in such manner that all the citizens may pay their quota, in proportion to their abilities and the advantages they derive from the society." 9 Harris, 114; 10 Harris, 497. This principle is sanctioned by writers of the highest authority—Vattel, b. 1, ch. 20, s. 240; Rutherford's *Inst. of Nat. Law*, b. 2, ch. 3, s. 5; Puffendorf's *Law of Nations*, b. 7, ch. 9, s. 10. It is expressly declared by Baron Puffendorf, that "no immunities or exceptions," (from taxation) ought

to be "granted to certain persons to the defrauding or oppressing of the rest." It is upon this principle that, when the private property of the citizen is taken for public use, just compensation is to be made to him *out of the common fund*, in order that the contribution to the public interest may fall in a just proportion upon each citizen. Rutherford, b. 2, ch. 3, s. 5. As the Legislature are necessarily the judges of the method of assessing taxes, it is to be presumed that they have regarded the rule of contribution sanctioned by justice and the equal rights of the citizen; and their enactments are not always subject to judicial review. Where they make appropriations to institutions of learning or charity, or grant lands or pensions to persons who have served in the defence of the nation, it is presumed to be a compensation for the good that has been done or is to be done to the community. Where they grant to the same institutions or individuals an exemption from taxation, such grants, for the same reason, are not regarded as a violation of the rules of justice and equality, so long as there is no *contract* which may tie the hands of succeeding legislatures against repealing such exemptions; and so long as they are not repealed, they seem to have been enforced as a legitimate exercise of legislative power. 1 S. & R. 62; 6 Watts, 435.

But where there is no pretence of an intention to equalize the taxation among the people, but an avowed purpose to sell to one class of citizens an exemption from all taxes forever, and thus to throw all the public burthens upon the other, for all time to come, it is, to all intents and purposes, imposing a tax upon them without the consent of their representatives, and is such a plain, palpable and open violation of the rights and liberties of the people—such a clear case of transcending the just limits of legislative power, that the judiciary is bound to pronounce such an act null and void.

No class of corporations stand more in need of the protection of the government, or occupy more of the time of the Legislature and the courts of justice, or occasion more expense to the public than railroad corporations. From the extensive nature of their operations, from the exercise of the power to take private property for the construction of their works, and their continual collision with

each other's interests, and with the interests of individuals and municipal communities, they require the constant and the energetic protection of the strong arm of the government. Withdraw that protection and they would be left to the mercy of popular outbreaks, manifesting themselves by opposition to their progress and the destruction of their works whenever the location of their roads or their depots, or any of their numerous and necessary operations come in conflict with the interests of particular localities. These corporations should be the last to consent that the government should be enfeebled by the diminution of its revenue, or to ask that it should be bound to exert all its energies, and incur large and constant expenditures for their protection, while they are exempt from contributing their share.

These principles are not so infirm as to stand in need of the staff of authority for support. They are the result of that liberty and equality which was established by the revolutionary struggle of our ancestors. They are perfectly understood by every one who has capacity to comprehend the nature of our free institutions. They are deeply impressed on the hearts of the people, and they are fully recognized by the history, the objects and the language of our State constitution.

The case of *New Jersey vs. Wilson*, 7 Cranch, 164, is cited in opposition to this doctrine. It was decided without argument on the part of the State. It has relation altogether to the power of the colonial government, by treaty with the remnant of a tribe of Indians, who released lands claimed by them, in consideration of the grant of other lands free from taxation. The Indians occupied in some respects the condition of a separate nation. Nations are frequently obliged, for the sake of the public peace, to make concessions to each other, which would not be justified if the transaction were between a State and individuals; and the rules which govern in the construction of the treaty making power, do not apply to ordinary contracts. But it is a sufficient answer to this case to say, that the powers of the colonial government of New Jersey, before our free governments were established by the Revolution of 1776, furnish no rule whatever for ascertaining the powers of the Legislature of Pennsylvania, under our present constitution.

In the case of *Gordon vs. The Appeal Tax Court*, 3 How. 142, it was "admitted by the attorney-general of the State of Maryland, that there was a contract between that State and the Banks, and that it was protected" by the Supreme Court of the United States. The question of the constitutional power of the Legislature to contract away the taxing power was therefore neither raised nor decided. If it had been, the question would have had relation to the powers conferred by the constitution of Maryland, and not to those delegated by that of Pennsylvania.

The case of *Hardy vs. Waltham*, 7 Pick. 110, was that of an exemption granted by the old colonial ordinance of Massachusetts of 1650, and subsequently confirmed by the people in their State constitution. A decision affirming the power of the people, when establishing their constitution, to confirm an exemption from taxation granted to a college by an ancient colonial law, has nothing whatever to do with the question involved in this case. That the people themselves possess this power has never been doubted. All power emanates from them. But it is denied that they have in this State granted any such power to the Legislature.

In *Atwater vs. Woodbridge*, 6 Conn. Rep. 223, and in *Seymour vs. Hartford*, 21 Conn. Rep. 481, the question of the right of the Legislature to contract away the taxing power so as to bind future Legislatures, did not arise, because the subsequent enactments were not construed or understood as a repeal of the exemptions previously granted. The intimations of the judge in delivering the opinion in the last mentioned case, that such a power had been judicially sanctioned, go for little, particularly when we see that he deplores the exercise of such a "high act of legislative power," and declares the intention of the court "not further to extend this exemption from taxation." The progress of the age and the experience of government enable it to see and correct the errors committed during its youth and inexperience.

In *Brewster vs. Hough*, 10 New Hampshire Rep. 138, it was held that "the power of taxation is essentially a power of sovereignty or eminent domain;" and Chief Justice Parker, in delivering the opinion of the court, questions the power of the Legislature

to make a contract by which it shall be surrendered without express authority for that purpose in the constitution. He held that there is "a material difference between the right of a Legislature to grant lands, or corporate powers, or money, and a right to grant away *the essential attributes of sovereignty*. These," he adds, "do not seem to furnish the subject matter of a contract." In these views we fully concur. The attribution of power by the States to the Union is not in conflict with this principle, for the act of Union is but an enlargement of the political society for certain described purposes, and the power of taxation that passed to the federal government was but a natural and necessary sequence of it. It was not extinguished by contract, but merely transferred to another portion of government to be *exercised* for the general welfare under the limitations prescribed.

In general, the State courts have avoided expressing an opinion on this momentous question, where the necessities of the case did not require it. The cases, which have arisen, have generally been disposed of by holding that "exemptions are binding until repealed by subsequent legislation"—that "no charter or grant carries with it such exemption unless clearly expressed"—that "the taxing power is of vital importance and is essential to the existence of government"—that it is "a part of the power of legislation"—that "it resides in a government as part of itself," and that "the release of it is never to be assumed." Most of these principles are announced by Chief Justice Marshall, in the *Providence Bank vs. Billings*, 4 Pet. 561, 562, 563, and recognized by many decisions in this and other States. 10 Barr, 442; 12 Harris, 232; 10 Harris, 496. But the question has been distinctly decided against the existence of any such power five different times by the unanimous judgment of all the judges of the Supreme Court of Ohio. *Debolt vs. The Ohio Life Insurance and Trust Company*, 1 Ohio State Reports, 563; *The Toledo Bank vs. The City of Toledo*, Ibid, 623; *Mechanics' and Traders' Branch Bank vs. Debolt*, Ibid, 591; *The Milan and Rutland Plank Road Company vs. Husted*, 3 Ohio State Reports, 578; *The Norwalk Plank Road Company vs. Husted*, 3 Ohio State Reports, 586. In one of these cases, it was de-

clared that the Legislature had not the constitutional authority to abridge or in any manner whatever surrender any portion of the right of taxation, and that this question had been settled by solemn adjudication, and is not now an open question in that State. 3 Ohio State Rep. 581. It is true that the Supreme Court of the United States has taken a different view of the question, and has in several cases, reversed the decisions of the Supreme Court of Ohio. *Piqua Bank vs. Knoop*, 16 How. 369; *Mechanics' and Traders' Bank vs. Debolt*, 18 How. 380; *Same vs. Thomas*, Ibid, 384; *Dodge vs. Woolsey*, Ibid, 331.

The decisions of the Supreme Court of the United States, on the construction of the constitution or laws of the United States, are binding on the State courts. The decisions of the Supreme Courts of the several States, on the construction of the constitution and laws of their respective States, are in like manner binding on the Supreme Court of the United States. That court has no more right to overrule the judgment of a State court on a question of State law, than the State court has to overrule the United States court on a question of United States law. All contracts are to be construed and understood according to the law of the place where they are made and to be performed. The laws and constitution of a State are to be construed and understood everywhere according to the judicial construction which they receive in the State where they are made and are to operate. This is the rule of jurisprudence which prevails throughout the civilized world. It is the rule which always ought to govern, and which generally does govern the Supreme Court of the United States. Wherever there is a departure from it, the necessary result is to impair public confidence in that exalted tribunal and to introduce disastrous confusion into the administration of the law. It cannot be expected that the judges of the federal court shall be as familiar with the constitution, laws and usages of Ohio, as the Supreme Judges of that State, who reside within her limits—who have been chosen on account of their acquaintance with her laws, and whose especial business it is to expound them. The decision of the highest judicial tribunal in a State, on the construction of the State constitution, or a State law, is authoritative

everywhere, when the same question arises, because it is pronounced by the only tribunal having direct and immediate jurisdiction over the question. The decision of the United States court on the same point, where it incidentally arises, is not authority elsewhere, because it has no direct and immediate jurisdiction over the question. Its duty is to receive the State law as it is expounded in the tribunal of the last resort in the State. These views furnish a plain rule for estimating the value of the conflicting decisions which have been cited. We have no hesitation in adopting the decisions of the State courts on all questions respecting the meaning of their own State constitutions, and the extent of the powers which the people of the States have therein granted to the different departments of their own State governments. It may be added that the United States court was divided in opinion on this question. Three eminent judges of that court dissenting, while the State court was unanimous. And it is but just to say that the opinions of the State court are sustained by a course of argument which has never been satisfactorily answered in the United States courts, or elsewhere.

Chief Justice Taney, in maintaining the opinion of the United States Court, admits that that court "*always* follows the decisions of the State courts in the construction of their own constitution and laws;" but he adds that, "where those decisions are in conflict, the United States Court must decide between them;" and he then puts the decision on the ground that the alleged contract was made "under a construction in favor of its validity, which had been undisputed for nearly fifty years by every department of the government, and supported by *judicial* construction." 16 How. 431. If these were the facts of the case, we find no fault with the decision, except that the *State* court, and not the *federal* court, was the proper tribunal to pronounce it. We have no sympathies with States or individuals who desire to break engagements entered into with their agents, on the ground that the latter have transcended their authority, after the principals, by acquiescence and encouragement, have induced unsuspecting parties to enter into such engagements, and invest their money on the faith of them. Common justice requires every principal to disavow the act of an agent who exceeds

his authority, the moment it is known. But, in the case now before us, there has been neither encouragement nor acquiescence. The unauthorized act was openly and promptly disavowed and opposed, in the mode pointed out by the constitution and the laws, the moment that an attempt was made to give it the *form* of a contract.

It is objected that the governor is not subject to this form of our jurisdiction. It is far from our intention to claim the power to control him in any matter resting in executive discretion. But the rule of law seems to be, that when the Legislature proceeds to impose on an officer duties which are purely ministerial, he may be coerced by mandamus or restrained by injunction, as the rights of the parties interested may require. In such a case, no individual in the land, however high in power, can claim to be above the law. This rule is sustained by the case of *Marbury vs. Madison*, 1 Cranch, 137; *Griffith vs. Cochran*, 5 Bin. Rep. 87; *Commonwealth vs. Cochran*, 6 Bin. 456; *Commonwealth vs. Cochran*, 1 S. & R. 473. It seems to us that the sale of the property of the State at auction is not a part of the governor's constitutional duty as chief magistrate. It is very probable that the Legislature have no power to impose any such duty upon him. But if he consents to perform a ministerial act, the judicial power to administer justice and restrain against acts contrary to law, cannot thereby be ousted or evaded. And if it be shown that the act under which he claims authority to dispose of the public property, or to divest private rights, is unconstitutional and void, he may, of course, like any other individual, be restrained from proceeding. But we have too much respect for the office to resort to this measure unnecessarily, and quite too much respect for the incumbent to suppose that any such proceeding will be necessary after the opinion of the court is pronounced.

There is no constitutional objection to the repeal of the tonnage tax, or any other tax, whenever the Legislature, in the exercise of their discretion, shall think proper to pass such a law. The objection is to the sale of the taxing power in such a way as to put the resources of the State out of the reach of future Legislatures, should the public necessities require a resort to them.

There is no legal objection to the sale of the Main Line, nor to

the right of the Pennsylvania Railroad Company to become a competitor and purchaser, upon equal terms with any other person or corporation. The objection is to that part of the proviso in the third section of the act of 16th May, 1857, which requires the Pennsylvania Railroad Company to bid \$1,500,000 more than any other bidder, and in consideration thereof proposes to release the said company, and also the Harrisburg, Mount Joy and Lancaster Railroad Company forever, from the taxes therein stated. The injunction is to be awarded merely to prohibit a sale of the Public Works upon these terms. All other parts of the act are constitutional, and there is nothing to prevent a sale to the Pennsylvania Railroad Company, or any other corporation or person or persons, under the GENERAL provisions of the act.

ORDER. .

It is ordered that, upon the complainants, or either of them, filing a bond in the penal sum of one thousand dollars, with sufficient sureties, to be approved by this court, or any judge thereof, conditioned to indemnify the defendants from all damages that may be sustained by the injunction granted on this motion, an injunction be awarded, commanding the Pennsylvania Railroad Company, and its officers and agents, named as defendants in this bill, to make no bid for the purchase of the Main Line of the Public Works under that part of the proviso in the third section of the act of 16th May, 1857, which requires the said company to pay, in addition to the purchase money at which the works may be struck down, the sum of one and a half millions of dollars, and in consideration thereof assumes to discharge forever the said railroad company, and also the Harrisburg, Portsmouth, Mount Joy and Lancaster Railroad Company from the payment of all taxes upon tonnage and freight over said railroads; and also to release the said Pennsylvania Railroad Company from the payment of all other taxes or duties on its capital stock, bonds, dividends or property, except for school, city, county, borough or township purposes. And also commanding the said Pennsylvania Railroad Company, and its officers and agents aforesaid, strictly to abstain from accepting any assignment on the

terms stated in the aforesaid part of the said proviso, or executing or delivering to the Treasurer of the State any bonds of the said company, for any greater amount than the sum at which the Main Line of the said Public Works may be struck down at a public sale, on a fair and equal competition with all other bidders.

And also commanding the said Pennsylvania Railroad Company, and its officers and agents aforesaid, strictly to abstain from accepting any transfer of the said Main Line of the said Public Works from the Secretary of the Commonwealth, under the great seal of the State, founded upon or in consideration of any purchase upon the terms herein prohibited. And also commanding Henry S. Magraw, the Treasurer of the State, strictly to abstain from accepting the delivery of any bonds executed by the said Pennsylvania Railroad Company upon the terms herein prohibited, or for any greater amount than the sum at which the said Main Line of the Public Works may be struck down at a fair public sale of the same, upon equal terms to all persons and corporations desiring to purchase. And also commanding Andrew G. Curtin, Secretary of the Commonwealth, strictly to abstain from making any transfer of the said Public Works, under the great seal of the State, upon the terms herein prohibited, or for any greater amount than the sum at which the said works may be struck down at a fair public sale as aforesaid.

This injunction to remain in force until hearing, or the further order of this court.

NOTICES OF NEW BOOKS.

A BOOK OF FORMS, containing more than two thousand Forms for Practice in the Courts of Pennsylvania, and of the United States, and for Conveyancing; also, for the use of Public Officers and men of business generally; adapted to the recent Acts of Assembly of Pennsylvania; with Explanatory Remarks, and numerous Precedents and References to standard authorities. To which are appended a Glossary of Law terms, and a copious Index. By JAMES D. DUNLAP, Counsellor at Law, etc. Fourth revised edition. Philadelphia: Kay & Brother, 19 S. Sixth street, Law Booksellers, Publishers and Importers, 1857. pp. 969.

The learned author tells us, in his preface, that the "extensive sale of this work, and the changes in the Acts of Assembly, have necessarily caused the editor to increase the editions more rapidly than designed. Its

NOTICES OF NEW BOOKS.

general use among the legal profession, has also "necessitated an enlargement."

"In this edition a very large increase of new and improved Forms and References have been added, and the forms in the third edition have been revised, and adapted to the changes in the Acts of Assembly and the decisions of the Supreme Court. A variety of forms for Affidavits, Accounts, Admiralty, Agreements and Contracts, Amalgamation, Bills of Exchange and Notes, Bonds, Certificates, Committals, Deeds, Decrees, Depositions, Divorces, Equity, Executions, Executors and Administrators, (in relation to appraisement of real estate, under Act of Assembly, to be set apart for children,) Judgments, Inventories, Landlords' and Tenants' Liens, Mechanics' Liens, Orphans' Courts Registers, Patents, Public Schools, Real Estate, (in relation to Trusts under Act of Assembly, April, 1853,) Sheriffs, Wills, and Directions for making and recording Wills."

Probably a more convenient book for the Pennsylvania lawyer has never been presented. It contains precisely those matters which may be found in the scientific treatises on legal subjects, but in a form which is assumed. A good form-book is indispensable to facilitate business. And such a book Mr. Dunlap has long supplied to his professional brethren in the three former editions. In this edition, the new matter and the amended matter are added, and valuable additions. We commend the work, as a standard guide, of much value.

AMERICAN LEADING CASES, being Select Decisions of American Courts in all departments of law, with especial reference to Mercantile Law. By T. I. CLARK HARE and H. B. WALLACE. Fourth edition, enlarged and revised, with additional Notes and References to American Decisions. By T. I. CLARK HARE and J. W. WALLACE. In 2 vols. Philadelphia: T. & J. W. Wallace, Law Booksellers, Publishers and Importers, 197 Chestnut Street, between 8th and 829.

The notion of a Selection of Leading Cases was suggested by Mr. Smith, in his "Law Studies" and was practically carried out by Mr. Smith. The remarkable success and real value of the work is attested by the numerous editions and increasing demand for it. "American Leading Cases." The enterprising publishers now present a new edition of "American Leading Cases," which is greatly enlarged and improved; some of the Notes are entirely re-written, and the principles discussed more

BOOKS.

Thousand Forms for Practice in the Courts of the United States, and for Conveyancing: with Explanatory Remarks, and numerous Authorities. To which are appended an Index. By JAMES D. DUNLAP, Counselor at Law. Philadelphia: Kay & Brother, 19 & 21 South Second Street, Importers, 1857. pp. 962.

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copious citations of, and comments upon, the later American Cases. This work should be studied in connection with "Smith's Leading Cases."

"In some of the points," say the editors in their preface, "selected for discussion in the present volumes a reference has been had to the subjects of the American Notes to Mr. Smith's work, so as to complete certain titles by treating of matters not touched in those Notes, yet allied to the topics there concerned. In the American Note to *Twyne's Case*, in the former publication, the subject of fraud under the statutes of Elizabeth as connected with the retaining of possession on sales of chattels, was discussed; in the present volume the subjects of fraud in voluntary conveyances and in assignments to trustees for the benefit of creditors, the latter of which is quite peculiar to this country, are treated at large. In the note to *Bickerdike vs. Bollman*, the necessity of demand and notice in respect to the liability of the endorers of negotiable instruments was illustrated. In several notes, in this volume, the negotiability and negotiation of notes and bills and the nature of the demand and notice required are investigated. In the earlier publication, the formation of partnerships and the powers of one partner after a dissolution of the association, were treated; in this, the power of one partner to bind the firm during its continuance, and the rights of joint and separate creditors, and the incidents of real estate held by a partnership are examined. Besides these subjects, the title of agency is exhibited in full, in this volume, in a series of cases. Owing, perhaps, to a peculiar state of society among us, it has happened that the subject of the contracts of infants is capable of being illustrated from the American Reports, with a copiousness of examples and a certainty in principle, which the English books do not exhibit. There is a note accordingly upon that subject. The topics of interest, domicile and application of payments are also discussed; and the whole subject of slander, libel and malicious prosecution is treated in a series of notes."

ANNUAL DIGEST OF THE LAWS OF PENNSYLVANIA, for each of the years 1854, 1855, 1856 and 1857, namely, from 28th May, 1853, to 22d May, 1857; together with some laws of older date, inadvertently omitted in Purdon's Digest; 1700 to 1853. Marginal References, a digested Syllabus of each Title, foot notes to the Judicial Decisions, and a full and exhaustive Index, in which the contents of all these Annual Digests are incorporated in one alphabet. The whole completing Stroud and Brightly's Purdon's Digest to the present date. By FREDERICK C. BRIGHTLY, Esq., Author of the Law of Costs, Equity Jurisprudence, etc. Philadelphia: Kay & Brother, 19 S. Sixth street, Law Booksellers, Publishers and Importers.

We are again furnished with Mr. Brightly's compact and convenient Annual. The learned editor has so fully satisfied the wants of his brethren in the matter of our statutes, that it is only necessary to announce the publication of Brightly's Supplement. It is a work without which no Pennsylvania lawyer can practice with safety and comfort.

THE

AMERICAN LAW REGISTER.

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SEPTEMBER, 1857.  
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THE ENGLISH DOCTRINE OF USES, AS AN ELEMENT OF THE AMERICAN LAW OF CONVEYANCE.

The alienation of real property anterior to the statute of uses presents to the consideration of the legal student two remarkably distinct and well defined periods. The earlier one was that of simple, unadulterated, legal ownership, and the extremest simplicity was a controlling feature, both of the estates which might be created as well as the method of their inception and alienation. The transfer of landed estates was discouraged by cumbersome restrictions; no right in land was recognized unless it was clothed with possession, while possession and ownership could only be conveyed to another by the simplest method of transferring title ever known to the law—open and notorious livery of seisin. The law rested thus for years, but the wants of extending intercourse, and a growing commercial spirit, were hostile to such *status*, necessitating a departure from such unwieldy requirements, and effecting in the end a more commodious and suitable method of transfer. The courts of chancery—and here begins the second period, and the birth of distinction between equitable and legal ownership—at a date as early as the reign of Edward III, or Richard II, began to recognize a double ownership in lands, and then grew up a consequent discrimination

between equitable and legal ownership.¹ The equitable owner entitled to the rents and profits of land, whereof another person had the legal title and seisin, was possessed of an estate of which the courts of chancery took cognizance under the name of "use." It is possibly not a legitimate subject of inquiry in this behalf, whether or not the incorporation of this doctrine upon the common law, was a subtle attempt on the part of the ecclesiastical houses to evade the statutes of mortmain. It is certainly, neither necessary or within the province of this dissertation to trace the resemblance between uses and the ancient *fidei commissa*; nor, still following in the footsteps of the civil law, to discuss the introduction of the writ of subpoena,² and how the estate at conscience, formerly dependent upon probity and entreaty, became compellable by the courts of chancery; nor still beyond all this, and despite the numerous petitions for the abolition of the entire system, during the reigns of the 4th and 5th Henrys, how prerogative and jurisdiction was assumed and exercised, "here a little and there a little," and the system grew into an enlarged and admirable science.

The progress of the jurisdiction in this regard may be briefly stated to be: 1. Pernancy of the profits. 2. Execution of estates. 3. Defence of the land,³ and the powers of jurisdiction being then exhausted, the system began slowly to be elaborated and construed. Though the religious houses had been concluded from acquiring the use of lands, yet the advantages which this method presented, of evading the hardships of the feudal tenure, of being devisable, descendible and especially convenient for family settlements, so strengthened in the public favor that almost the entire property of England was held in this manner.⁴ Possessed of these advantages, it was not however devoid of grievances. The cestui que use, though generally in possession, was the merest tenant at sufferance: the feoffments were secret, and he who had cause to sue for land, knew not against whom to bring his action; the husband was barred of his curtesy, the wife of her dower, the lord of his privilege, and the creditor of his extent for rent. To remedy these inconveniences,

¹ 2 Bl. Com. 328.

² Inst. 2, 23, 12.

³ Gilbert on U. & T. 1; Plowden, 352.

⁴ 2 Rol. Abr., 780.

abundant statutes were passed, the intent of which was to remove these objections, and to dispel the prevalent obscurity and confusion of title, on account of which innocent purchasers were so frequently defrauded.¹ Legislators alarmed at the continuance of a system which required such frequent enactments to repel its encroachments upon the domain of common law prerogative, by the passage of a statute in the reign of Henry the eighth, attempted to restore the original simplicity of the common law, and terminate the existence of this foundling doctrine which "had for its parents fraud and fear, and for its nurse a court of conscience."

The enactment, after reciting the grievances consequent upon the law of uses as then understood and practiced—provided,² "that when any person shall be seised of lands, &c., to the use, confidence or trust of any other person or body politic, the person or corporation entitled to the use in fee simple, fee tail, for life or years, or otherwise, shall from thenceforth stand and be seised or possessed of the land, &c., of and in the like estates, as they have in the use, trust, confidence, and that the estate of the person so seised to the use shall be deemed to be in him or them that have the use, in such quality, manner, form and condition as they had before in the use.

"Up then to this time, according to Lord Bacon, a use was no title, right or interest in law, neither *jus in re* nor *ad rem*, that is, neither an estate nor a demand; it was nothing for which a remedy was given by the courts of the common law, being a species of property totally unknown to it, and for which, therefore, it was impossible that it should make provision."³

As the statute imports, it is an act for the transferring of uses into possession. It executes the use *eo instanti* with the instrument of conveyance, conveying the possession to the use, and transferring the use into possession, making the cestui que use owner complete both in law and equity. In so far as that instrument contemplated the abolition of double ownership in real property, or the discontinuance of this method of conveyancing, and a compulsory resort

¹ 1 Rich. ii. 9; 4 Hen. vi. 17; 1 Hen. viii. 1; 19 Hen. 7, 15; 4 Hen. v. 7, 15; 1 Rich. iii. 1; 11 Hen. vi. 85.

² 27 Hen. viii. 10.

³ Bac. Read. 59; 1 Rep. 140, a.

to the elder methods of assurance known only to the common law, it has signally failed in the accomplishment of its design. Viewing it however, not as to the ends which it was originally intended to compass, but as to the actual conveniences which it has achieved it has done much—very much. In consequence of the passage of that statute, and the consequent exercise of jurisdiction by the courts of common law over this branch of the law of real property, methods of transferring landed estates have been originated which give to that species of property almost equal facility of disposition with negotiable paper. Effecting a greater revolution in the science of jurisprudence than any which has occurred since the violent superinduction of the feudal tenure upon the laws of the Anglo Saxons, it has proven the foundation of a system of conveyancing, which slowly elaborated and perfected by the teachings of every day experience, has continued to the present day at least, prosperous and strengthening. Having thus stated in as brief a manner as is necessary for clearness and correctness, the English doctrine of uses as left by that statute; turn we now to the other branch of our subject touching the recognition of the statute and its English interpretation by our courts, and the manner in which the theory which pervades their law, is adopted and enforced in our own.

The principles of the common law concerning emigration are among the most considerate and practical of its provisions. What a sterling legal maxim is that which entitles English subjects going to an uncivilized country to carry with them both the common and statute law existing at the time of colonization? How discreet the theory that colonial infancy shall not be left to grope its way with feeble and hesitating footsteps, first through the walks of the simpler municipal regulations, and then through the mazes of more extensive and entangling legislation, but at once and ever its growth shall be encouraged, its weakness protected and its prosperity insured, under the benign influence of a matured and healthy jurisprudence, and under the protecting ægis of the British Constitution. Laying fast hold of that doctrine, it has never been questioned that English statutes passed before the emigration of our ancestors, applicable to our situation, or in amendment or ameliora-

tion of the common law, are part and parcel of the common law of this country.¹ That the English law of conveyancing, both common and amendatory, being wholly applicable to our situation, and in the highest degree important, of necessity became our common law is true, we think, beyond a peradventure.² We are not forced, however, to trust solely to this vague and unsatisfactory method of determining whether the doctrine of uses, as settled by the passage and interpretation of that statute is engrafted upon our system of conveyancing. In a majority of the considerable commercial States, the leading features of the statute 27 Hen. VII have been directly recognized by decisions of the highest judicial authority and importance. In some States, when it was thought dangerous to rely solely on such a general adoption of statutes in matters of so great moment as the efficacy of deeds and the tenure of estates, the substance of the statute has been incorporated into their local laws, and thus stability and certainty given to this branch of their jurisprudence.

The task undertaken is, to examine how far the general theory of that instrument, as well as its direct provisions have been adopted in the several States. To borrow the words of Junius—"the consideration of what is reasonable or unreasonable makes no part of this question. We are inquiring now, what the law is, not what it ought to be. Reason may be applied to show the impropriety or expediency of a law, but we must have either statute or precedent to show the existence of it."³ By the examination of the adjudications of the judicial, and the enactments of the legislative departments, we hope to ascertain definitely as to the recognition, application and modification of such precedent and statute.

In New Hampshire, it has been held that the statute is not superseded by the acts of 1791 or 1701, but impliedly recognized by them, and still in force.⁴ In Massachusetts the doctrine of uses appears to have been recognized at an early day, and not disturbed under the R. S. of 1836, and in that State estates may still pass by

¹ 2 Salk. 441; Jour. of Cong. Oct. 14, 1774; 5 Pet. 238.

² 6 Mass. 31; 2 Met. 118.

³ Junius, Letter xvi.

⁴ 3 N. H. 234, 432; 1 N. H. 232; 15 N. H. 462.

way of use.¹ The laws of conveyancing in Maine were derived from the last mentioned commonwealth, and the legislative enactments copied *literatim*. It follows as a necessary sequence that the same operation is given to the deeds in each State, and to the due construction thereof, the decisions of the parent commonwealth are applicable.² Several direct adjudications are cited from Connecticut.³ In one of them a very elaborate opinion is given, in which the court says: that the forms of their ancient conveyances show satisfactorily that even in the earlier days of that State, it had been considered that the provisions of that statute were in force, since those forms were such as had been brought into use in consequence of the passage of that statute in England, and are more peculiarly adapted to operate as consequences under its provisions than by the common law. Latrobe says in his Justice, that it is with difficulty the laws of Maryland concerning deeds can be succinctly collected and made intelligible. We find in an old case involving no less a point than title to the province, that the people of that State have considered themselves, and the courts have adjudged them entitled to the benefit of all the statutes of England antecedent to the settlement of the province.⁴ By the report of William Kilty, Chancellor, in 1817, the statute was in full force and practice.⁵ The legislature of New Jersey, in lieu of the statute itself, repealed during the colonial existence, passed an enactment not identical with the English statute, but it is thought embodying the theory and expressive of the leading features of that instrument.⁶

In Virginia a statute has been adopted which executes the use in the case of bargain and sale, lease and release, and covenant to stand seised or deed so operating.⁷ It is by the operation of this statute, says a correspondent of Griffith's Law Register, that the tenure of real property in this State is in a great measure regulated, its influence not being less general and effective than in England. In South Carolina the substance of the statute has been re-enacted,

¹ 4 Mass. 135; 6 Mass. 24.

² 5 Greenl. 282; see 32 Me. 329.

³ Colony Records, vol. 1, 417, 436; Kirby, 368; 1 Conn. 354; 16 Conn. 474.

⁴ 2 H. & McH. 279.

⁵ Report of Stat. 281.

⁶ R. S. (1847) 673, § 7.

⁷ Code (1849) 502, § 14; 1 Lomax Dig. 188, 196; 3 Call 482.

and the several assurances which operate under its provisions have full force and effect.¹ In Alabama, by state enactment, conveyances by bargain and sale, lease and release, covenant to stand seised, or deed so operating, suffice to pass the possession to the purchaser, equally as if he had been enfeoffed with livery of seisin² similar operation is given to deeds by statutes in several States: in North Carolina,³ Kentucky,⁴ Florida,⁵ Rhode Island,⁶ Mississippi,⁷ Massachusetts,⁸ Michigan,⁹ and Indiana.¹⁰ Of course a deed operative under the statutes of such States, dispenses with the theory of raising a use, and executing it by force of the statute of uses, and yet, that the system is a living and vigorous one despite the restraining influence of these local enactments, the reports of some of the States we have just cited will abundantly establish. In Delaware, it is briefly enacted that the legal estate shall accompany the use and pass with it.¹¹ The provision of the statutes of Arkansas, is almost the same, with the addition—as also in Pennsylvania and Mississippi—that the words “bargain and sale,” shall be held to be an express covenant that the grantor is seised, &c.¹² In Pennsylvania, according to the very complete report of the judges of their Supreme Court in 1808, the effective portion of that statute has always been in force.¹³ In Iowa,¹⁴ Georgia,¹⁵ Illinois,¹⁶ and Missouri,¹⁷ the essential portion of the statute is enacted and conveyances effected by virtue of the provision,—“that when any person shall stand seised of lands to the use or trust of another, by reason of any deed of bargain and sale, &c., the person entitled to such use, trust, &c., shall be deemed in lawful estate and possession, and the estate, right, title and interest, shall be in the person having the use, trust, &c., in such like estates, and after such quality as they had before in the use or trust.”

¹ 2 Pub. Laws, 466; Grif. Law. Reg. 882; 2 M'Cord, 252.

² Clay's Dig. (1843) 156, § 35.

³ R. S. (1852) 196, c. 24, § 4.

⁴ Pub. Laws, (1844) 260, § 11.

⁵ R. S. (1836) 405, § 1.

⁶ 1 R. S. (1852) 232, § 4.

⁷ R. S. (1837) 188, c. 31, § 1.

⁸ Laws (1839) 85, c. 28.

⁹ 1 R. S. (1856) 153, § 3.

¹⁰ 1 R. S. 259, c. 43, § 4.

¹¹ Thompson's Dig. (1847) 178, § 4.

¹² How. & H. Dig. (1840) 349, c. 34, § 26.

¹³ R. S. (1838) 257, § 1.

¹⁴ Stat. Del. (1829) 89, § 1.

¹⁵ 3 Binn. 619 App.

¹⁶ Hotchkiss' Laws, 410, § 38.

¹⁷ R. S. (1845) 218, § 32.

In California, Wisconsin and Texas, we are not able to find any thing which will either directly establish or disprove the proposition under investigation. In Tennessee, according to a late excellent work upon conveyancing, there is a decision to the effect that the statute has never been in force.¹ The statute of the state provides that "all deeds, in what manner or form soever drawn, shall be effective."² In Louisiana, as the common law is not the basis of their system of jurisprudence, we presume it is incontestible that the statute does not obtain. In Vermont, notwithstanding an early decision of the United States Circuit Court, that she, in common with her sister New England States, had adopted the statute³ according to the recent judgment of her supreme court of judicature, the statute is not in force in that State,⁴ and so says Chipman.⁵ In Ohio, upon a fair presentation of the question to the court, we find it held—"that since the political organization of that State, they can find no trace of the authority of this statute as a rule of property, and no distinction is known in practice between uses and trusts. The system of conveyancing, although it has grown out of the English system, does not depend upon the statute of uses, but has taken its form, and derives its authority from their own statutes and local usages. Under such circumstances the recognition of the power of this statute is unnecessary and mischievous, introducing, as it would, new and complex rules of property."⁶ In New York, the statute was recognized and applied for a great number of years, and the accumulative learning upon this subject which their earlier reports afford, bear faithful witness to the remark of the great master of our science, that "the use in law hath not its fellow." Upon the revision of their statutes years ago, objections were urged against the system, so serious in the estimation of the general assembly that uses and trusts, except as expressly authorized thereafter, were entirely abolished.⁷ Every estate in lands is declared to be a legal right, except as otherwise provided, and every estate held as a use executed under any former statute, is declared to be a legal estate,

¹ Thornton's Conveyancing, 482.

² Car. & Nich. Dig. 598, § 1.

³ Paine. C. C. 536. ⁴ 23 Vt. 600.

⁵ Chipman (Ed. 1793) 145, 146.

⁶ 7 Ham. (1st pt.) 275; Walker's Int. 310. ⁷ 2 R. S. (4th ed.) 136, § 45.

and all deeds operate as grants.¹ The wisdom or expediency of this revision it is not our province to discuss. According to an article in the *American Law Magazine* upon the subject, it has effectually accomplished that change which it was the design of the statute of uses to effect, the New York statutes passing the estate to the remotest cestui, and executing the ultimate trust.²

In order to raise a use, and have it executed according to the provisions of the statute, there must be a competent person actually seised to the use of the party beneficially entitled.³ Cornish divides the disabilities thus,—incapacities of a personal nature, those arising from tenure, and those springing from estate.⁴ Some of the old English authorities attempted to create a subtle distinction between “giving uses,” and “standing seised to uses,”⁵ but by our law it is thought that every one who is capable of taking lands by feoffment may be seised to use. A corporation could not anciently stand seised, although they might convey, but this distinction is regarded as a refinement not fit to be practiced in this country, and with us the word “person” of the statute is held to apply to corporations as well as individuals.⁶ Some of the conveyances under the statute require adhesion to certain technical rules, as to the matter of standing seised. For example, in the deed of covenant to stand seised, the person seised may be of the blood of the covenantor. The use being synonymous with the legal estate, and the same requirements necessary in the transfer, all those who may take lands by common law assurances, may be the recipients of the use. Indeed the practical theory which underlies the system of uses has so ameliorated the hardships of the old common law rules concerning alienation, that by way of use some may take lands, who were before incapacitated. A feoffment or bargain and sale to one, for the use of the wife of the feoffor, is executed under the statute, although the husband could not convey directly to his wife.⁷ When, however, the conveyance is to the separate use of a *feme covert* she may not take,⁸ although by the provisions of the New York statutes

¹ 9 Barb. S. C. 324. ² 6 Am. Law Mag. 268. ³ Bac. Read. 41.

⁴ Cornish on U. 58. ⁵ 2 Leon. 121, 8 id., 175. ⁶ 11 Wheat. 392; 2 How. S.C. 497.

⁷ 1 Sanders on U. 95; 16 Conn. 474; 20 Johns. 85; 3 Wils. 23.

⁸ 16 Pick. 330; 4 A. & E. 582.

it would seem she might.¹ As was before remarked, in a deed of covenant to stand seised, one not of the blood of the covenantor, cannot take the use. The statute provides for a cestui que use *in esse*, when therefore there is a disability, as a company unincorporated, or a person under some temporary incompetency, the feoffees take the estate until such time as the disability is removed, when the statute executes the use and the estate vests.² The statute also makes necessary a use *in esse*, in possession, reversion or remainder, and the word "seised" of the statute applies to all freehold estates. It had been adjudged that as the statute of uses in Virginia did not make mention of this word, it was comprehensive enough to embrace terms for years.³ The position was ably refuted by Lomax.⁴ As to the kinds of property which may be conveyed, the statute itself provides for the alienation of "lands, tenements and hereditaments," and enactments of the several states have usually followed such provision. Bacon says that a use is to be understood only of those things whereof an inheritance is *in esse*.⁵ No use can be conveyed in lands of which the grantor is not actually or constructively seised in possession, reversion or remainder, for every such disfulal implies of necessity a precedent possession. The estate of a mortgagor may be conveyed to uses,⁶ but the interest of a mortgagor, though generally a legal seisin as against the mortgagor, is not capable of being transferred, so as to be executed by the statute.⁷ Nothing whereof the use is inseparable from the possession—*quae ipso usu consumuntur*—can be granted. If the use conveyed is greater than the estate out of which the statute serves the seisin, it will cease upon the determination of the precedent estate, but will be good for that time.⁸ Brief space will suffice to notice the old common law methods of assurance as made applicable under the system of uses. The more ancient and common of them is the deed of feoffment, and the distinctive feature of its operation is the notorious livery of seisin, which is necessary to convey title. Though in most of the states it is still a lawful, yet it is an exceed-

¹ 3 Barb. C. 632; 1 id. 220.

² 4 Wend. 494; 1 Greenl. 271; 5 W. & S. 323.

³ 3 Call, 482.

⁴ 1 Lomax' Dig. 188, 197.

⁵ Bac. Read. 43.

⁶ 1 M'Cord, Ch. 239.

⁷ 13 Penn. 98.

⁸ 1 Atkyns, 523.

ingly unusual mode of alienation, and the registry of our deeds stands in lieu of livery of seisin. Anciently, by this form of conveyance, the feoffee took the legal estate, but now feoffees to use have no interest or estate at all, but in respect of the contingent estate and uses limited in the deed, "they are but conduit pipes to lead the uses."¹ When a use is raised by feoffment, the feoffor having parted with the legal possession, out of which the statute serves the seisin, cannot stand seised to the use of the feoffor, as the bargainor or covenantor who retain in themselves the legal seisin and estate.² Cases of feoffment to use, we find but rarely in the books, they being generally not construed as such, unless to carry out the intention of the parties, which would otherwise be frustrated. The few decisions which the reports afford are based on general leading principles, easily capable of elementary compression, and valuable especially for their learning as to the construction of deeds.³ The deed of lease and release, although the customary method of alienation in England, as it does not require the trouble of enrollment, has grown quite into disuse in this country. Contained in two instruments of conveyance, it has the effect of but one. The lessee estate being created by lease, of bargain and sale, the use being executed in the lessor without entry, the freehold which then vests in the releasor by way of enlargement, being an estate at common law, which does not require the aid of the statute to execute.⁴ As the first conveyance has all the characteristic qualities of a deed of bargain and sale, and is like it, a mere contract to convey, the examination of that species of conveyance will suffice for this. The deed of bargain and sale is a real contract, by which the bargainor "bargains and sells," that is contracts to convey to the bagainee and thus becoming trustee for, or seised to the use of the bargainee, the statute completes the purchase. The bargain first raises the use, and the statute vests the possession, making complete the seisin, without livery or entry.⁵

To render a bargain and sale deed capable of execution by the statute, there must be an estate out of which a use can be raised,

¹ Noy's Tenures, 15.

² 8 Conn. 518.

³ 4 Mason, 45; 8 Pick. 521; 9 Cowen. 487.

⁴ 1 Wash. C. C. 70.

⁵ 10 Johns. 456; 8 Cranch, 229; 2 Inst. 671.

and then a valuable consideration and words competent to raise a use. No precise form of words is necessary, if they actually amount to a present contract of sale. The words "remise, release and quit claim," "release and assign," "for value received," and "make over and confirm," will answer to raise a use by way of bargain and sale.¹ As to the consideration requisite—if a valuable one be proven it is competent to raise a use, although it be unexpressed.² Without such consideration the deed cannot operate.³ Only the first use arising in a bargain and sale is executed, for no use can be served out of the possession of the bargainee to a third person, he can only be seised of the land to his own use, and in him alone can the legal estate be vested by the statute.⁴ In Pennsylvania, by act of General Assembly, 1715, such deeds have the same effect for giving seisin and possession as feoffments, and as is the case with that species of conveyance, the use raised may be executed in any one in whose favor it is expressly declared by the deed.⁵ The authorities are in conflict as to whether a freehold to begin *in futuro* can be created by deed of bargain and sale. In Massachusetts, and the New England States generally, it is held that a use takes instantaneous effect in the bargainee; the statute has then exhausted its jurisdiction, the only seisin out of which a use might be raised has passed from the bargainor, and nothing of energy remains in the statute to execute the use at the time limited.⁶ In New York, the opinion of the court is stated to be that the seisin does not pass from the bargainor at the execution of the deed, but abides in him until the contingency happens, or the limited period has expired, and then the operation of the statute completes the purchase.⁷ Of this opinion is the learned commentator on American law.⁸

By the deed of covenant to stand seised, a person seised of lands, covenants that he will stand seised of them to the use of another. On executing the conveyance, the other party becomes entitled to the use of the land according to the stipulations of the instrument,

¹ 10 Johns. 456; 3 Id. 484; 18 Id. 60. ² 1 Cowen, 622. ³ 16 Johns. 515.

⁴ 16 Johns. 304; Sanders on U. 364; 1 N. H. 65; 8 Johns. 388.

⁵ 4 W. & S. 192.

⁶ 4 Mass. 235; 12 Id. 96; 22 Pick. 876.

⁷ 1 Johns. Cas. 96; 3 Wend. 235; 20 Johns. 87; 9 Wend. 611. ⁸ 4 Kent's Com. 298.

and the possession and ownership is presently annexed to the use, and words will suffice to constitute this deed, which sufficiently indicate the intention.¹ Having the same effect as a deed of bargain and sale, there is an essential difference in the considerations necessary to support the two. Founded as it is on the consideration of blood or marriage, this deed of covenant to stand seised can only be effective between relatives, and no use can be raised for any purpose in one not within the influence of the domestic consideration.² The existence of a consideration other than that of blood or marriage does not impede the operation of the deed. Collateral consanguinity has been decided not to be a sufficient consideration to support the deed.³ It is not essential that the consideration should be named in the deed, if it appears upon its face, or can be inferred from the relations of the parties,⁴ for if the consideration of blood or marriage is at all necessary to support the deed, it is to be presumed when the fact of such consanguinity actually exists,⁵ and the law even allows relationship to be averred and proven as the operating and controlling consideration, although a different one may be embraced in the deed, and no mention made of the existing consanguinity.⁶ Property may by this method of alienation be conveyed directly from husband and wife.⁷ Estates to commence *in futuro* may be and are usually created by this conveyance.⁸ So a bargain and sale for a pecuniary consideration will operate as a covenant to stand seised to the use of the party within the pale of the consideration in order to effectuate the intention of the bargainor without any technical words for that purpose.⁹ A deed reserving to the grantor the use and improvement of land during his life, operates as a covenant to stand seised to his own use during life, and after death to the use of covenantees and their heirs.¹⁰ This species of deed duly recorded cannot be limited in its effect by a subsequent deed from the grantee to a third person, nor by such

¹ Willes, 637; 1 Sand. Ch. 258. ² 16 Johns. 575; 22 Wend. 140.

³ 1 Cowen, 622. ⁴ 1 Johns. Cas. 91; 3 N. H. 234.

⁵ 7 Pick. 115; 20 Johns. 85; 4 Taunt. 20; 12 Mass. 95. ⁶ 18 Pick. 397.

⁷ 2 Wils. 28; 16 Conn. 474. ⁸ 7 Mass. 384; 18 Id. 339; 4 Cowen, 427.

⁹ 11 Conn. 545; 4 Mass. 135; 20 Johns. 85. ¹⁰ 1 Conn. 354; 3 N. H. 432; 3 Wend. 233.

deed is the possession of the grantor converted into one adverse to the covenantee.¹ A deed which is inoperative as a feoffment for want of proof of livery of seisin, or a release, if there be no lease to make it valid, or a deed of bargain and sale impeached for want of consideration, even in contradiction to its expressions, would still be operative as a covenant to stand seised, and pass the estate to the party entitled.²

• It is requisite for the operation of the statute, and the execution of the use, that there should be a person seised to the use of some other person, a cestui que use *in esse*, and a use *in esse* in possession, reversion or remainder. To persons *in esse* the legal estate is executed immediately, and as to persons not *in esse*, it will vest presently upon their coming into being.³ Whether the use will be executed, depends very much upon the intention of the parties, as evidenced by the instrument of conveyance. If the party seised to the use is simply to hold to the use of the cestui, then the statute executes the use into possession, but when it is necessary to the due execution of the trust imposed that the legal estate should remain in the hands of the person seised to the use, and when he is unable to perform the duties appurtenant to such trust other than by possessing a legal estate, in such cases the use remains unexecuted, and the doctrine of trusts, with its multifarious learning, is to be applied to its due construction.⁴ When a conveyance of land is made "for the sole use and benefit" of a feme covert, it has long been well established that as the intention is to give an interest, separate in the wife and beyond the control of the husband, such provision is not an executed use, but a technical trust.⁵ This is fairly expressive of the theory of the statute that the legal estate given must be commensurate with the use, and that if it only has the power to serve out a legal estate of precisely the same compass as was possessed before in the trust and confidence. Or, as the rule is laid down by the New York courts, "by the common law as well as by the statute, the trustee takes only that quantity of interest

¹ 4 Munf. 478.

² 1 Har. & John. 527; 6 Paige, 526.

³ 2 Wash. 9; 4 Wend. 49.

⁴ 1 N. H. 282; 12 Pick. 152; 1 Hill, 418.

⁵ 1 Hill. on R. P. 300; 1 N. H. 65; 16 Pick. 327; 4 A. & E. 582.

which the purpose of the estate requires, and the instrument creating the use expressly demands or constructively permits.¹

Whenever there is *in esse* a cestui que use, a well defined use and a seisin out of which the use may be served, the operation of the statute then ensues, the possession of the vendor is transferred to and becomes the possession of the purchaser *eo instanti* with the execution of the instrument of conveyance, and the property is wholly and at once legally vested in the person beneficially entitled.² When there is no suspension of the authority to alienate, the real intention of the party creating the use will in all cases be carried into effect. When the trust is passive, the design is accomplished by giving the cestui a legal estate; when active, by construing it to be a power in trust, if it cannot take effect as a technical trust.³ The statute executes none but the first use, the seisin out of which the estate is passed is then exhausted,⁴ but it will execute any number of uses, one after another as they arise.⁵ When a conveyance may take effect at common law or under the statute, it operates at common law, unless the intention of the parties points adversely, and when the party seised to the use and the cestui is the same person, he never taketh by the statute unless there be a direct impossibility or impertinency for the estate to take effect by the common law.⁶

We have before noticed, in speaking of the estates which may be conveyed to uses under the English system, that they may be limited in fee, for life or years, and that the same position stands good in the American law the books furnish abundant decisions.⁷ There are also certain technical requirements touching those to whom uses shall be limited by deed of bargain and sale, covenant to stand seised, &c., and we have before mentioned that a limitation of a use upon a use is not executed. In many instances the courts have not followed the peculiar rules of the common law concerning the limitations of use, but adhering to the doctrine that the statute executes after that "form, quality and condition as the cestui had in the

¹ 4 Denio, 385; 21 Wend. 147; 3 Coms. 525. ² 18 Penn. 98; 1 Selden, 455.

³ 8 Sandf. S. C. 174. ⁴ 9 Cowen, 437; 16 Johns. 304. ⁵ 10 Gill & J. 448.

⁶ 3 Md. 505; 3 Johns. 388. ⁷ Kirby, 368; 9 Paige, 107; 10 Id. 266.

use," have originated limitations of estate totally unknown to the simplicity of the earlier law. Springing uses are limited to arise on a future event when no precedent estate is limited, and when they do not take effect in derogation of any preceding interest, the operation of the statute being as it were in abeyance until the use should arise.¹ Thus a freehold may be conveyed to begin *in futuro*, and the limitation is good by way of springing use.² When, however, there is an estate precedent capable of supporting a remainder, then it is to be construed as a remainder, and not a springing use.³ Shifting or secondary uses are those which take effect in derogation of some other estate. They are common in family settlements, and are either limited by the deed creating them or authorized to be appointed by some person named in it.⁴ The use limited to change by matter *post facto* or a use to arise hereafter in lieu of another limited in the mean time, as when in a deed a fee is given to two grantees, with a proviso that in case one shall die before a certain time, his estate shall go to the other, the instrument cannot operate as a common law conveyance, because it limits an estate upon a fee, but the limitation takes effect by way of shifting or secondary use.⁵ Future uses are common, and take effect *in futuro* in distinction from those which vest in a certain person presently. Contingent uses are future, with still the difference that they depend upon the happening of some event. Kent says, they are limited to take effect as remainders.⁶ Cornish draws the distinction, contingent uses and remainders, at great length and with much technical learning.⁷ Fearne says, they may always take effect as remainders when limited upon a prior particular estate which it does not infringe, and possessed of the two qualifications necessary in a remainder, dependence upon a prior particular estate, and expectancy on its determination.⁸ If the limitation by deed expires, cannot be executed, or was not to yest but upon the happening of a contingency, the use results back to the grantor creating it, for so much

¹ Mutton's Case, Dyer, 276, (b).

² 4 Mass. 185; 2 Wills. 75; 18 Pick 339; 9 Wend. 611.

³ 2 Doug. 757; 22 Pick. 376; 1 Conn. 354.

⁴ 20 Johns. 85; 8 N. H. 432.

⁷ Cornish, 164.

⁴ 1 Leon. 264 7 Pick. 11.

⁶ 4 Kent's Com. 298.

⁸ Fearne on Con. Rem. 11-20.

of the use as the owner of the land does not dispose of, remains still with and in him.¹

Executed uses being no more liens on probity, but ownership in land, and possessing all the properties of legal estate are of course subject to all debts and liabilities consequent upon such ownership. Having such properties, a use *in esse* cannot be destroyed by the alienation of the person having the seisin of the land.² Nor can the grantor in a deed of covenant to stand seised by giving conveyance to a third person, convert his possession into one adverse to that of the covenantor.³ In respect to future contingent uses, there must be a person seised to the use when the contingency happens, if they are to be executed; and if the estate of the feoffee to such uses be destroyed by alienation or otherwise before that contingency happens, the use is also destroyed.⁴

If we are at liberty to draw any conclusion from the preceding pages, we think it to be a safe one, that the system of uses in the American, as well as the English law, has insinuated itself deeply and thoroughly into all the regulations touching the alienation of real property. Formerly, used as a method of conveyancing to defraud creditors and keep the ownership of property uncertain and concealed in direct violation of the principles of the dominant tenure, which held that alienation should be open and ownership notorious, the system perhaps merited much of the objection which was urged against it. By pursuing uses from plain principles into all their consequences, and by occasional assistance from the legislative department, we think a nobler, rational, and as far as may be, a uniform system of law has been since established. *Cestui que use* no longer possessing a mere *jus precarium*, but having all the rights and subject to all the liabilities of legal ownership, and notoriety of transfer being effectually supplied by our registry laws, the system is made to answer all the demands and exigencies which may arise without producing aught of the fraud, inconvenience or private mischief meant by the statute to be avoided. Though the original design of that instrument may have been departed from widely, and

¹ 16 Conn. 484; 18 Pick. 397; 3 Johns. 388. ² 1 Johns. Cas. 91.

³ 4 Munf. 437.

⁴ 4 Kent's Com. 387; 22 Pick. 376.

though the machinery primarily intended to destroy the powers of an aristocratic clergy, is now used for the comparatively humble function of transmitting property from individual to individual, yet it has lost nothing of its dignity or usefulness. As to some of the old conventional prejudices and unwieldy requirements of the common law concerning the transfer of property, it has effected a complete though stealthy revolution, and inducted in lieu thereof provisions and conveyances, than which none are more necessary or practical. It stands also a *dernier* resort to effectuate conveyances by force of its energy when the machinery of the common or statute law proves unavailing. That courts have been compelled to have recourse to this doctrine in order to carry out the intention of the parties and effectuate conveyances void under the State statutes, the reports of Maine, New Hampshire, Delaware, North Carolina and others stand for example. The doctrine of uses forming then no inconsiderable portion of our law of conveyance, most of the panegyric which has been lavished upon the system by the English jurists, on account of the inconveniences prevented, the grievances concluded, and the open and practical method of transfer which it originated and perfected, is applicable to us. With reference to those States where the system is unrecognized or expressly abolished, we may say but a word. For the abrogation of the system, the objection most clamorously, and it would seem most successfully urged, has been that it perpetuated a great mass of useless requirements and technical jargon, and its abolition would to a great extent relieve the law of real property of its abstruseness and uncertainty. While it is very questionable whether in this crusade against the system of uses as now expounded and enforced, "the vigor and success of the war will come quite up to the lofty and sounding phrase of the manifesto," very certain it is, that the endeavor to abolish entirely what is termed the technical language and peculiar erudition of the law is both idle and useless. It is a judgment most imperfect to suppose that a science which is defined to be "the last effort of human intelligence acting upon human experience," struggling to combine inflexible rules with transactions and relations perpetually changing, the development of which has

engaged the attention of the subtlest and most profound intellects, could in this, its most important, intricate and technical department, be brought down to the general comprehension of even an intelligent and educated people. But the doctrine of uses has still another significance. The law of real property being founded on reasons mainly historical, surely its structure will be contemplated with more interest and its working more thoroughly understood and mastered by that intelligent practitioner who has accustomed himself to the comparison of past with actual and possible emergencies, and reflecting that *nihil simul inventum est et perfectum*, goes over all the familiar learning on the subject and traces institutions and laws to their origin to gain correct interpretation. Beyond the curious learning and speculative interest connected with this topic, viewing it as a system which has proven itself the parent of our present method of alienation and an important and all pervading element of our laws of conveyance, it cannot be that under any circumstances a considerate study of its theory and operation will be wholly useless or void of instruction.

C.

RECENT AMERICAN DECISIONS.

In the District Court of the United States for Ohio District.

EX PARTE SIFFORD, MARSHAL ET AL.

1. A return to a writ of *habeas corpus* issued by a judge of the United States, under the judiciary act of 1789, showing an imprisonment under process, legal and valid on its face, is conclusive, and precludes further inquiry into the cause of imprisonment.
2. But the seventh section of the Act of Congress of the 2d of March, 1833, expressly confers on a judge of the United States, the power to issue the writ of *habeas corpus*, in all cases of imprisonment by any authority of law, for any act done or omitted, in obedience to a law of the United States; and where such imprisonment is for an alleged violation of a State law, and by State authority, the judge or court issuing the *habeas corpus* may inquire into the circumstances under which the alleged crime was committed, with a view to the question whether the act complained of was done or omitted in the proper discharge of official duty, and under the authority of the United States: and, if it appears the act was so done or omitted, the judge or court is authorized to discharge the party from such imprisonment.

3. A marshal having a person in custody under lawful process, is bound to retain such custody, and in so doing may use such force as is necessary; and in the proper use of such force, is not guilty of a crime against the law of the State in which the transaction occurred.
4. A State judge has no jurisdiction to issue a *habeas corpus* for a prisoner in the lawful custody of an officer of the United States, with the knowledge that he is so held; and if, on the return of the writ, it appears the imprisoned party is held by an officer of the United States under legal process, the jurisdiction of the State judge ceases, and all further proceedings by him will be *coram non judice*.
5. A sheriff, or other State officer, having a so-called writ of *habeas corpus*, under the Ohio statute of 1856, and having knowledge that the prisoner named in the writ is in the custody of an officer of the United States, under legal process, is under no obligation to serve, or attempt to serve, such writ; and his return of the facts is a sufficient justification for not serving it.
6. A marshal, having custody of a prisoner under the authority of the United States, is not bound to surrender such prisoner upon the demand of a State officer, having a writ issued under the said Ohio statute, requiring him to *take* the prisoner from such custody.
7. But if the *habeas corpus* in the hands of the State officer is issued in good faith, and is the well known writ of that name, requiring the officer of the United States having the custody to bring the prisoner before the judge or court issuing the writ, with the cause of the caption and detention, it is the duty of such officer to obey such writ, as thereby he does not part with the custody of the prisoner; and such obedience will not be in conflict with his duty.
8. It is well settled by the adjudications, both of the courts of the Union and the States, that, in case of concurrent jurisdiction, the tribunal or court to which jurisdiction first attaches shall retain it; and neither has a right to interfere with the other.

The opinion of the court was delivered by

LEAVITT, J.—There is no cause to regret the indulgence which has been extended to counsel, in the presentation and discussion of this case, or the time, which, for reasons not necessary to be stated, has elapsed since the hearing commenced. In some aspects, the questions arising are important, and require great deliberation in their decision. Every case of conflict between the national and State authorities casts upon the judge or court called to pass upon it a most responsible duty; and such cases are the more embarrassing and difficult when the jurisdiction of the judge or court is challenged, and a decision of that question becomes necessary. It has been my

aim to consider with calmness the case before me, and to reach such conclusions as my judgment will approve. If I have succeeded in this, the criticisms of those differing from me in my views will, I trust, have no disturbing influence.

On the 27th of May last, Lewis W. Sifford, the marshal of the United States for the Southern District of Ohio, presented his petition, duly sworn to, for a writ of *habeas corpus*, alleging, among other things, that Benjamin P. Churchill and nine others, being deputy and assistant marshals, were unlawfully imprisoned in the jail of Clark county, by a process issued by a justice of the peace of said county, for acts done, or omitted to be done by them, as such deputies and assistants, in the proper discharge of their duties under a law, and by the authority of the United States. A writ of *habeas corpus* was issued, according to the prayer of the petition, directed to John E. Dayton, sheriff of said Clark county, requiring him to have the said Churchill and others, forthwith, before this court, with the cause of their caption and detention. The sheriff has promptly obeyed the writ, and has made a special return, stating the circumstances under which the deputies and assistants were delivered into his custody. The important questions arising in the case are presented on a motion for the discharge of these persons.

The facts necessary to be noticed, preliminary to the consideration of the points presented, are, that on the 23d of May last, separate warrants were issued by Edward R. Newhall, a commissioner of the Circuit Court of the United States, for the arrest of Hiram Gutridge and three other persons, residents of Champaign county, on charges of having aided and abetted a fugitive slave in his escape, and having resisted and obstructed the officers of the United States in the arrest of such fugitive. The persons named in the warrants were arrested by the deputy marshals and assistants; and when conveying them to Cincinnati, where the warrants were returnable, an attempt was made by the sheriff of Clark county to take said prisoners from the custody of the officers by a *habeas corpus* issued by the probate judge of Champaign county. The sheriff, in his return to the *habeas corpus* issued to him from this court, alleges that the writ issued by the probate judge was put into his hands for

execution by the sheriff of Champaign county, and that, in company with one Compton as an assistant, he attempted to serve it, by taking possession of the four prisoners in the custody of the deputy marshals and their assistants; and that in this attempt he was violently resisted and assaulted, and failed to execute the writ according to its command. It appears that, on a complaint made before one Huston, a justice of the peace of Clark county, that the deputies and their assistants had unlawfully assaulted and beat the said sheriff, they were subsequently seized by a large armed force and taken before the said justice, and by him committed to the jail of Clark county; and while so in custody, a new complaint was made against them for an assault on the sheriff with intent to kill, and for shooting at said Compton with intent to kill, &c., before one Christie, a justice of the peace for said county, on which they were again arrested and committed to jail.

It may be noticed here that, after the seizure of the deputy marshals by the armed force, as aboved stated, and the consequent rescue of the prisoners from their possession, they were taken by the sheriff of Greene county before the probate judge of Champaign, by virtue of the *habeas corpus* issued by him and were summarily discharged by his order, and have since been at large.

In considering the question before me, I shall not attempt to review the extended and able arguments of the counsel, or notice all the points raised in the discussion. It has been insisted very strenuously that this court cannot order the discharge of the deputy marshals, on the ground that, at the time the writ of *habeas corpus* was served, the imprisonment alleged as existing when the writ issued had ceased, and they were then in custody on process afterwards issued. I do not propose to consider this point further than to remark that, from the return of the sheriff of Clark county, it would seem at least doubtful whether, at the time of the service of the *habeas corpus*, the deputies were in custody under the first or the second warrant. There seems to have been a continuous custody under these warrants; and it would be somewhat technical, in such a case as this, to base an order for remanding the deputies on the ground stated.

It is also urged—and this is the main point of the argument of the counsel resisting the discharge of the persons in custody—that, as it appears from the return to the *habeas corpus*, they are in the custody under process issued by a justice of the peace, regular and lawful on its face, this court has no jurisdiction to go behind that process, and inquire for what cause and under what circumstances it issued.

It is admitted that, in reference to the writ of *habeas corpus* issued by the courts and judges of the United States, under the judiciary act of 1789, the position assumed is undoubtedly correct. The return of the officers showing a detention under process, legal and valid on its face, would be conclusive and preclude the court or judge from further inquiry under that act. But the *habeas corpus* now in question, was issued under the second section of the act of the 2d of March, 1833, which provides, "That either of the justices of the Supreme Court, or a judge of any District Court, in addition to the authority already conferred by law, shall have power to grant writs of *habeas corpus* in all cases of a prisoner or prisoners in jail or confinement, when he or they shall be committed or confined on or by any authority of law for any act done, or omitted to be done, in pursuance of a law of the United States, or any order, process or decree of any judge or court thereof—anything in any act of Congress to the contrary notwithstanding."

The words of this provision are so explicit and intelligible, that there would seem to be no room for doubt as to their meaning. They do confer and were intended to confer, on a federal judge, the power to issue the writ of *habeas corpus* whenever there is an imprisonment "by any authority of law for any act done or committed under a law of the United States." Now, the point to be inquired into and determined by the judge issuing the *habeas corpus* is, whether the act for which the party is imprisoned has been done in the discharge of official duty, under the authority contemplated by the provision referred to. But if the return to the writ, showing an imprisonment, under State process, shuts out all further inquiry, the act of Congress is a dead letter and its purpose altogether defeated.

The occasion of the passage of the act of Congress of 1833 has been referred to; and, it is contended in argument, that it must be limited in its operation to a state of things similar to that then existing; and was intended only to guard against nullification, when it appeared in the form of resistance by State authority, to the revenue laws of the United States. It was doubtless such threatened resistance that called the law into being. But, it has been permitted to remain on the statute book, in full force for upward of twenty-five years. This has not been the result of accident or inadvertence. It was obvious to the members of Congress, and the statesmen, who have, since the enactment of the law, participated in the affairs of the country, that it was a wise provision and necessary to meet any subsequent case of improper interference by a State with the legislation of Congress, in matters pertaining to the national government, and within the range of its exclusive powers.

There is high judicial authority for the exercise of the power in question by a judge of the United States, under the act of 1833 in the case, *ex parte Robinson*, 6 McLean, 355, known as the Rosetta case. The facts stated are, that a female slave, traveling in company with her master, in the State of Ohio, was taken by a writ of *habeas corpus* before a probate judge, at Columbus, and adjudged by him to be free. She was afterwards arrested by the marshal, as a fugitive, upon a warrant issued by a commissioner; and upon a *habeas corpus*, issued by Judge Parker of the Court of Common Pleas of Hamilton county, the alleged fugitive was discharged from the custody of the marshal. She was again arrested upon another warrant issued by the same commissioner, and, while in custody, and before the examination by the commissioner, Judge Parker adjudged the marshal guilty of a contempt for re-arresting the female; and he was committed to jail under that judgment. Judge McLean, on the petition of the marshal, issued a writ of *habeas corpus*, returnable before him; and after full argument on the facts stated, ordered the marshal to be discharged from imprisonment. The learned judge did not hesitate to issue the *habeas corpus*, under the statute of 1833, and admitted evidence of the facts relating to the imprisonment of the marshal, and discharged him on the ground

that he was imprisoned for an act omitted to be done in obedience to law. Although in that case there had been a judgment by a court of record, that the alleged fugitive was entitled to her discharge, this was not held to be conclusive; and the judge asserted the right of going behind the judgment and examining the whole proceeding. The result was, that the imprisonment of the marshal was declared to be illegal, and for an act omitted, pursuant to the law of the United States. In his opinion, the judge says: "A sense of duty compels me to say that the proceedings of the honorable Judge Parker were not only without authority of law, but against law, and that the proceedings are void, and I am bound to treat them as a nullity."

Another case, cited in argument, *ex parte Jenkins*, 2 Wallace, Jr., 521, asserts the power of a federal judge to issue the writ of *habeas corpus* in all cases within the language of the act of 1833, and to discharge, under all circumstances, where the imprisonment is for an act done by authority of the United States. The learned Judge Grier, of the Supreme Court of the United States, in his opinion in that case, says: "The authority conferred on the judges of the United States, by this act of Congress, gives them all the powers which any other court could exercise, or gives them none at all. If under such a writ they may not discharge their officer, when imprisoned by any authority, for an act done in pursuance of a law of the United States, it would be impossible to discover for what useful purpose the act was passed. Is the prisoner to be brought before them only that they may acknowledge their utter impotence to protect him?"

The case last referred to is very similar, in several of its aspects, to the one before this court. In that case several deputy marshals were resisted in their attempts to arrest a fugitive. A complaint was made before a justice of the peace, charging the deputies with an assault and battery on the fugitive; a warrant was issued by the justice and the deputies were lodged in jail. They applied for a writ of *habeas corpus*; and although it appeared on the hearing they had been committed on process, legal and right on its face, Judge Grier received evidence that the deputies were imprisoned

for an act done in the discharge of their duty, and without hesitancy delivered them from the custody of the jailer.

These cases establish beyond doubt, that a federal judge, or court, upon the return of a *habeas corpus* issued pursuant to the act of 1833, setting up an imprisonment under State process, regular on its face, may receive evidence as to the facts connected with such imprisonment; and, if it appears to have been for an act done or omitted in the performance of official duty, to order the discharge of the party. There is no reason to doubt the correctness of this construction. It does not imply any invasion of the sovereignty of the State, whose process is thus treated. Nor is it based on any assumption or claim that a federal court or judge has any jurisdiction to revise or set aside, the judgments of the courts or magistrates of the State. It is merely the exercise of power to inquire into the cause of imprisonment; and if such cause is within the contemplation of the act, to grant an order for the discharge of the imprisoned party. Neither does it import, as suggested in the argument, that a federal judge or court can protect an officer of the United States from punishment for a crime committed against the laws of the State, under pretence that he was doing his duty.

If the jurisdiction, to the extent indicated, does not exist, it is very clear the sovereignty of the United States is liable every day to be contemned and trampled upon. Upon any other view, it is entirely in the power of any one, corrupt enough to make a false oath against an officer of the United States, having charge of offenders against its laws, to procure their release, and most effectually to obstruct and nullify the legislation of the Union for the punishment of crime. It is easy to conceive, how not only the fugitive-slave law, but the laws for the protection of the post-office department, and laws punishing the making of spurious coins of the United States, may be defeated in their salutary operations, if the jurisdiction referred to does not exist.

It is now proper to inquire, whether from the facts before the court, it sufficiently appears the deputy marshals were in the rightful and proper discharge of their duties, when the act charged upon them as a crime against the State of Ohio was committed. I shall endeavor to do this as briefly as possible.

In the first place it may be remarked, that these deputies were in the possession of lawful process for the arrest of parties charged with a violation of the laws of the United States. And it may be also noticed, that it was not optional with them whether they would serve the process. They were under the obligation of an oath, not only to support the Constitution of the United States, but faithfully and promptly to serve all legal process which should come into their hands for service, and were subject to punishment for not doing so. There is no question, from the evidence, that the warrants referred to, were legally served, and that the prisoners were legally in the custody of the deputy marshals. .

Having the prisoners thus in lawful custody, they had an undoubted right to use all the force necessary to retain them in such custody. And in case of an open, undisguised attempt to rescue them by force, they would be justified in killing the assailants, if that were necessary to retain the possession of their prisoner ; and such killing clearly would not be a crime against the State of Ohio.

But it is insisted that the sheriff of Clark county was in possession of a valid and legal writ of *habeas corpus*, which he was attempting in good faith to serve, and that he was violently and illegally resisted by the deputy marshals in such attempt. On the other hand, it is urged that the *habeas corpus* placed in the hands of sheriff Layton was merely colorable, issued in fraud of the law, and was a part of a conspiracy by which to effect the rescue of the prisoners. This writ has been the subject of much comment by counsel ; and authorities have been cited to show that it was a nullity, and that the sheriff was under no obligation to serve it. As a consequence, it is insisted, the deputy marshals were not bound to respect it, and could incur no liability for resisting its execution.

I cannot take the time necessary to discuss or decide all the points made in the argument in reference to this writ. The transcript of the proceedings by the judge of probate of Champaign county, who issued the writ and to whom it was returnable, and by whose order the prisoners were discharged, is before me. The writ was obtained upon the application of one F. W. Greedhough, who,

against the truth of the case, took upon himself the responsibility of swearing that the prisoners were detained in custody, by Churchill, without legal authority. It was issued under the Ohio act of 1856, and is directed, not to the person having the prisoners in charge, but to any and all the sheriffs of the State of Ohio, without any showing, "by affidavit or otherwise," that the officer or person having the prisoners in custody will refuse or neglect to obey the writ. This obvious disregard of the provisions of the statute, I suppose, invalidates the writ, and a sheriff would have incurred no liability by a refusal to serve it. But I do not propose to discuss this question, nor to comment on the strange and anomalous provisions of the statute referred to. It will suffice to say that while it provides for a writ, designated as a writ of *habeas corpus*, the writ has really none of the qualities or characteristics of that great writ of right. Whatever may have been the design of the statute, it seems admirably suited to effect the rescue of any prisoner in the custody of an officer of the United States. All that is needed for this purpose, is an affidavit that such prisoner is illegally detained in custody, and by the aid of this statute it would be practicable upon the oath of an unscrupulous affiant, to effect the discharge of a prisoner in the penitentiary, under sentence of any court of the United States.

But it is further objected to the writ issued by the probate judge, that he had no jurisdiction, and that the writ is therefore a nullity. A great number of cases have been referred to in the argument in support of this position. Without a critical notice of these cases, it may be sufficient to remark, that the doctrine seems now to be settled that a State judge has no jurisdiction to issue a writ of *habeas corpus* for a prisoner in custody of an officer of the United States, if the fact of such custody is known to him before issuing the writ. And it is well settled that if, upon the return of the writ, it appears the prisoner is in custody under the authority of the United States, the jurisdiction of the State judge is at an end, and all [further proceedings by him are void. In the case of *Sims*, reported in 7 Cushing's Rep. 285, the Supreme Court of Massachusetts decided, that in all cases "before a writ of *habeas corpus*

is granted, sufficient probable cause must be shown; but when it appears upon the party's own showing that there is no sufficient ground *prima facie* for his discharge, the court will not issue the writ;" and again the court say: "It is not granted as a matter of course, and the court will not grant the writ of *habeas corpus*, when they see that in the result they must remand the party." In the case of *Norris vs. Newton and others*, 5 McLean, 92, Judge McLean says: "I have no hesitation in saying that the judicial officers of a State, under its own laws, in a case where an unlawful imprisonment is shown by one or more affidavits, may issue a writ of *habeas corpus*, and inquire into the cause of detention." The learned judge, it will be noticed, has reference to an imprisonment under the authority of the United States, and decides, as the condition on which a State judge may issue a writ of *habeas corpus*, that it shall first be shown, by affidavits or otherwise, that such imprisonment is unlawful. And he holds, that when it is known to the judge that the imprisonment is under a law of the United States, his jurisdiction ceases, and all further proceedings in the case will be *coram non judice*.

It does not appear from the transcript of the proceedings before the probate judge of Champaign county, that the prisoners were in custody under process of the United States; but it is hardly supposable that the fact was not known to that judge. But as this is not shown in the transcript, it cannot be assumed as a fact. A strong light is, however, cast upon this transaction by the proof before the court, that when the prisoners were brought before the probate judge, and when it was his duty to inquire into and ascertain the precise ground on which they were held in custody by the deputy marshals, he ordered them to be summarily discharged. The reason of this order, as appears from the transcript, was, that no one appeared to show by what authority the prisoners were arrested and held in custody. The truth was—whether known to the probate judge does not appear—that the deputy marshal named in the proceedings, and who was so solemnly called and defaulted for his non-appearance, was, at the time, a close prisoner in the jail of the adjoining county of Clark!

It is also insisted, in argument, that if the deputies had the lawful custody of these prisoners, and were justified in resisting any attempt to take them by a State officer, that such resistance was excessive, and that, by such excess, they have forfeited the protection intended by the act of 1833, and are amenable to the law of Ohio. As before noticed, the only question with which I am now to deal is, whether the act charged as criminal against the deputies was done in the proper discharge of their official duties. This inquiry necessarily leads to a notice of some of the facts before the court, in connection with the attempted rescue of the prisoners. Many of the statements in the affidavits have no reference to this transaction, and need not be specially noticed. It is the alleged violence of the deputies in resisting the sheriff, that forms the basis of the complaint against them before the justice of the peace of Clark county. If in this they have done no more than their official duty justified them in doing, they are within the protection of the act of Congress.

In stating my views on this point of the case, I shall not attempt a critical examination of the statements of the witnesses on either side. In some important particulars there are discrepancies and contradictions in the facts set forth in the numerous affidavits which have been read. I shall make no effort to reconcile these; nor is it necessary that I should indicate an opinion as to the credit due to the conflicting statements.

There are some considerations which are conclusive of the question indicated. In his oral evidence, if not in his affidavit, sheriff Layton admits he was notified when the writ of *habeas corpus* was placed in his hands, that the persons having the custody of the prisoners were deputy marshals, and held the prisoners under the authority of the United States. It is very clear, upon the authorities before referred to, that, with a knowledge of this fact, even if the writ were valid, the power of the sheriff was at an end, and he was wrong in attempting the service. As an officer sworn to support the Constitution of the United States, he was under no obligation to serve it, and would have incurred no liability in refusing to do so. His return of the fact that the prisoners were held by the

paramount authority of the United States, would have been a complete justification for not serving the writ. He was fully aware that the writ could not be served without bringing the authorities of the United States and the State of Ohio into direct collision, and that the issue to be settled was purely one of physical power. If unnecessarily, and against the obligations of official duty, he placed himself in a position of peril, he may be supposed to have done so with a full knowledge of what the consequences might be, and a determination to meet them at all hazards.

To understand the nature of this conflict, it should be remembered that the deputy marshals, by their official oaths, were under a positive and paramount obligation to retain their prisoners, and to oppose all attempts to rescue them. The prisoners were lawfully in their custody, and they would have been derelict in duty to have parted with that custody, unless compelled to do so by an overpowering physical force. The sheriff had a writ which commanded him to *take* the prisoners from the custody of these officers of the United States. It was not the usual and well-known writ of *habeas corpus*, summoning the party having the alleged unlawful custody of the persons named in the writ, to have them before the officer issuing it, with the cause of their detention, but a writ requiring them to be taken, forcibly, if necessary, from those having the prior and lawful custody. This was the only way of serving the writ; and the question whether it could be served, was simply a question of power. So the sheriff understood it; and hence he and his assistants deliberately armed themselves, as a preparation for the conflict, which they foresaw was inevitable. In serving the writ, their first object was to do what the writ required—namely, to take the prisoners from the custody of the deputy marshals. Counting, probably on the active co-operation of the prisoners, they made this attempt. It is altogether immaterial whether the sheriff, on coming up with the United States officers, announced his official character, or that he had a writ requiring him to take the prisoners. If such announcement were made—which is doubtful from the weight of the testimony—it was an idle form, which the deputies were not bound to respect, and which can have no influence in the decision of this

question. They would have been faithless to their duty if they had quietly surrendered their prisoners upon such a notice.

It is apparent, from facts not in controversy, that the sheriff and his assistant well understood how the writ was to be served. They were apprised that a mere statement that they were officers of the State of Ohio, and had a writ of *habeas corpus* for the prisoners, would come altogether short of the exigency of the writ. They knew that nothing but the actual capture of the prisoners and their corporeal custody would answer its demands. Hence, the first movement was the seizing, by the assistant of the sheriff, of the bridle of the horse in the foremost carriage. He was resisted in this attempt, and immediately aimed his revolver at the deputy; and, if he did not actually fire, it is beyond all question he made the attempt. Whether he fired, or only made the attempt, the officer whose life was thus put at hazard, had an undoubted right, in self-defence, to disable his assailant, and was fully justified in firing at him with this view. It may be noticed here, as throwing some light on the intention of the sheriff and his assistant, that the sheriff states as his impression that his assistant, as he drove past the rear carriages, pointed his pistol from the carriage in which he rode; thus giving a very significant indication of what might be expected if the prisoners were not peaceably surrendered.

But it is said the sheriff was most wantonly injured in this affray. In his oral testimony he states that, after leaving his buggy, he approached the carriage in which Churchill rode, with pistol in hand, prepared to fire, and intending to fire at Churchill. This fact is clearly proved by many other witnesses in their affidavits; and it is also proved beyond doubt, that it was when the sheriff was thus approaching Churchill, that the latter seized him, with the sole view of disarming him, and thus saving his own or the life of another person. It is greatly to be regretted that the sheriff was so severely injured in this rencounter; but if any fact is established in this case, it is that these injuries resulted from the conflict in the attempt to disarm him. In such a contest, the degree of force which may be used cannot be graduated with absolute precision.

If the writ put into the hands of the sheriff had been issued in

good faith, and were the well-known writ of *habeas corpus*, requiring the deputy marshals to produce the bodies of the prisoners, for the purpose of inquiring into the cause of their detention, it would have been the duty of those officers to take the persons before the judge. If not as a matter of legal obligation, the courtesy due to the authorities of another jurisdiction would have required this. In doing this they would have retained the possession of the prisoners, as no State judge, it may be presumed, would have authorized their discharge, when it was made known to him that they were held under valid United States authority. But, as before noticed, the writ under the extraordinary Ohio law of 1856, requiring the officer to whom it is directed to *take* the prisoners, no matter by whom or by what authority they are detained, is a wholly different thing. This act seems to have been inconsiderately passed, and in its practical execution must lead to frequent conflicts between the national and State authorities. It might, with great propriety, be designated as an act to prevent the execution of laws of the United States within the State of Ohio.

It seems clear that the deputy marshals were right, under the circumstances of this case, in resisting the attempt to rescue the prisoners from their custody. Judge Nelson, one of the justices of the Supreme Court of the United States, has stated the law on this point with great force and accuracy. While he concedes that there may be cases in which a State judge may be justified in granting a *habeas corpus* for a prisoner in confinement under United States process, he asserts that, if the process is legal, the officer having the person in charge will not be justified in surrendering that custody under any circumstances. The learned judge says: "In such case—that is, where the prisoner is, in fact, held under process issued by a federal tribunal, under the constitution, or a law of the United States, or a treaty—it is the duty of an officer not to give him up, or to allow him to pass from his hands at any stage of the proceedings. He should stand upon his authority; and, if resisted, maintain it with all the power conferred on him for that purpose." (1 Blatchford's Rep. 635.) Even in cases where there is concurrent jurisdiction in the general government and a State, it is well

settled, both by the adjudications of the federal and State courts, that the tribunal to which the jurisdiction first attaches shall retain it. In the case *ex parte Jenkins*, before cited, Judge Grier says: "Where persons or property are liable to seizure and arrest by the process of both, that which first attached should have the preference. Any attempt of either to take from the legal custody of the officers of the other, would be an unjustifiable exercise of its power, and lead to most deplorable consequences." Such is the law where there is an admitted concurrent jurisdiction. With how much greater force does it apply where the right or power exercised is exclusive in the United States?

It cannot be necessary to notice further the legal points arising in the case, or the numerous facts set forth in the affidavits. The conclusions indicated seem to be fully sustained by the law and the facts. There is, however, a general view of the case, that leaves no doubt as to the real character of the transaction involved. It cannot be controverted, that there was a settled purpose, in at least a portion of the community in which these occurrences took place, to prevent, either by direct or indirect means, the execution of a law of the United States. Four persons had been arrested, under legal process, for an alleged violation of one of the provisions of the fugitive-slave law. There is known to exist, in the counties to which reference has been made, a decided feeling of hostility to that act; and the opinion is entertained—it may be honestly by many—that the law has no validity, and is not entitled to respect or obedience. Those entertaining these extreme views, seem to suppose there is not only no wrong, in any attempt to prevent its execution, but that such attempt is in itself meritorious. With such views, it is not strange that men should be prepared for extreme and indefensible measures to render the law inoperative. It does not admit of a doubt that practical nullification was the purpose of those who opposed the officers of the United States in the execution of their duties on the occasion referred to. Great excitement prevailed, and crowds followed the officers in charge of the prisoners. From their excited bearing, there were reasons for the apprehension that an undisguised and forcible attempt at a rescue would be

made. It does not change the real character of the views and purposes of these persons that they deemed it most expedient to effect their object by a resort to the forms of law.

Much has been said by counsel on the importance of the questions involved in this case. The danger of invading the sovereignty of the State of Ohio has been exhibited in most eloquent and forcible terms; and the court has been admonished of the fearful results of the exercise of jurisdiction in this case. It is readily conceded that a federal judge or court, should tread with cautious steps upon the line dividing the national and State sovereignties. But it should be remembered that sovereignty pertains to the government of the United States as well as to that of the States. The general government, within its constitutional limits, is supreme, and its action is paramount to any opposing action on the part of the States. Every right-thinking and right hearted American citizen will feel and admit the obligation resting on him to sustain the just powers of the Union, as well as of the State in which he resides. A proper fealty to both is due from and demanded of every citizen; and these obligations are neither repugnant, or inconsistent. Upon the just recognition of each depends the existence and perpetuity of our government.

Now, the practical question in this case is, whether a law of the United States can be evaded and set at naught, either by direct and violent opposition, which is rebellion, or by the specious pretences of law. And this question is in no degree affected by the character of the law sought to be nullified. I know well there is a deep seated hostility to the fugitive-slave act of 1850 throughout most of the free States. I am also aware that there is among the people of Ohio an almost unanimous sentiment in opposition to slavery; and that there are few, if any, of her citizens, who desire its introduction into the State. But these considerations do not excuse or justify attempts to defeat the national laws, sanctioned by the Constitution of the United States, growing out of the existence of that institution, in other portions of the Union. There may be very strong and well-founded objections to the law referred to, but, while it is a law, it must be respected and obeyed as such.

The power called forth in its enactment is one which belongs exclusively to the government of the Union, and with which the States have no right to interfere. It should be remembered, too, that it is an emanation of the will of the nation, expressed through the representatives of the States and the people, according to the forms of the constitution. Its repeal, by the same power that passed it, is the only method by which it can cease to have the force of law.

It is unquestionably true, that every citizen has a right to, and may enjoy and express, without stint or hindrance his opinions upon any law or measure of public policy; but it does not follow that he may evade or resist the execution of a law, because he regards it as unjust or inexpedient. If one man is to be tolerated in such evasion or resistance, in regard to one law, others may do the same as to other laws. The result would be, that every man, being a law unto himself, and acting under some vague notion of a *higher law*, would choose for himself what laws he would obey. This would produce a state of unmitigated anarchy, and effectually undermine the foundations of the social fabric. It is wholly beyond the limits of man's mental power to estimate the deplorable results of the prevalence of such a doctrine. As an unavoidable sequence, the bands of that union, which has been so potent for good to our country, so instrumental in its rapid advance to prosperity and greatness, would be dissolved. In this event, a future would be presented which none could contemplate without the deepest horror. I trust no such calamity is in store for this nation. It is matter of devout thankfulness that the safety of the Union is not placed in the keeping of politicians, or extremists of any school or any section of the country. In the underlying depths of public opinion, whatever may be the agitations on its surface, there is an overmastering power which, if the emergency shall arise, will come forth as a strong man armed in defence of the common bond of national brotherhood and national existence.

The deputy marshals are discharged.

Stanley Matthews, George E. Pugh, C. L. Vallandigham, for petitioners.

R. Mason and C. P. Wolcott, contra.

*In the Supreme Court of Vermont.*JUDSON B. FLETCHER vs. SAMUEL PHELPS AND BENAJAH PHELPS.¹

Lands bounded on Lake Champlain extend to the edge of the water at low water mark. The same rule applied, in this case, to lands near the lake bounded on a creek emptying into, and the waters of which ordinarily maintain the same level, and rise and fall with those of the lake; there being no claim made that the boundary should extend to the centre of the creek.

Assumpsit, founded upon a written agreement of the defendants to pay the plaintiff twenty-two dollars for each acre of a farm of land in South Hero, deeded by the plaintiff to Samuel Phelps and George Phelps. Plea, the general issue; trial by jury, August Term, 1854,—Peck, J., presiding.

The land deeded to Samuel and George Phelps was described in the plaintiff's deed as the south part of lot No. 88, bounded north by Abner Keeler's land, east by the lake and the creek, south by lands of Gardner Tracy, and west by lot No. 89. The only question in dispute was in reference to the eastern boundary of this lot, the plaintiff claiming it to be a line indicated, on a plan of the premises, as the Fletcher survey; and the defendants claiming it to be a line further west, indicated on the plan as the Phelps survey;—between these two lines it was admitted that there was a space of five acres and one hundred and fifty-two rods of land; the line claimed by the defendants being near the eastern border of the hard land, corresponding with the line of bushes hereafter mentioned;—and the line claimed by the plaintiff being near the western bank of the channel hereafter mentioned, which he claimed as the creek proper;—no part of said channel being included in the five acres and one hundred and fifty-two rods. The plaintiff's testimony tended to show that there was a creek which connected with the lake near the north side of the land in question, and extended southwardly about two miles; and that, opposite the premises in question, it was about sixty to seventy rods wide in high water, gradually growing narrower as you proceeded south; that in the

¹ We are indebted to the learned State Reporter for this case. It will be reported in 2 Williams' Rep.—*Eds. A. L. R.*

middle of the summer there was but very little water in the creek, and that confined to the channel near the centre ; that in the centre there was a channel from one to two rods wide, varying in width in different places, and somewhat crooked ; that this channel was a little lower than the surface of the land on each side ; that no vegetation grew in the channel, and that the five or six acres in dispute lay between the hard land west, which was skirted by a line of bushes or small trees and this channel, and that it lay low, nearly on a level with the lake, and was covered with water, from the lake, every spring, till some time in June ; that from 1810 to 1816 it was a quagmire, and of no value and capable of no use or occupancy ; and that it was not used for any purpose until 1816, when some wild oats and other vegetables began to grow there, and that it had been gradually filling up and improving ever since ; that the occupants of the hard land on the west had occupied this low tract in question in connection with the hard land, whenever the low land was susceptible of occupation.

The defendant offered to show that, by the original allotment of the town, the lots were sixty-four acre lots ; that the lot in question measured down to the east border of the hard land seventy acres ; that the land in dispute was navigable for vessels, every year, by water setting up from the lake ; and that it was covered with muskrat houses ; and that after the water in the lake fell, and about mid-summer, cattle strayed on the land in question,—but that no vegetation grew on it, except such as was about worthless and was not used except in years of great scarcity of hay, and in such case a great portion and most of the fodder cut on it was flags and bull-rushes ; that the land itself rose and fell more or less with the rise and fall of the water of the lake ; that the surface of the land in the lowest water was never a foot above the surface of the water in the lake ; that the land was susceptible of no cultivation, and that teams never had been and never could be driven upon it ; that this whole strip of land had always been known and called “ the creek ” by people of the vicinity ; that there were no distinct banks to the channel of the creek, but that what the witnesses on the part of the plaintiff called the channel was a narrow strip in the middle of

this low creek land, in which no vegetation whatever grew ; that it was slightly depressed in the centre and gradually rose to the edge of the low tract in question, where vegetation, such as described, grew, and from that point to within one or two rods of the hard land it was entirely level, and that from there, for a rod or two, it gradually and slightly ascended to the hard land ; that the creek and creek land extended in length about one and a half or two miles south of the land in question, gradually growing narrower at the south end, and connecting with the lake only at the north end ; that the rise and fall of the water in the creek was caused by the rise and fall of the water in the lake ; and that the water in the creek came wholly from the lake, except the surface water from the adjoining land in time of rains, and some small springs upon and above the land in question, which were drained off in the dry portion of the season through the channel of the creek.

The defendant offered to show in what manner the continuation of this strip of land had been regarded and treated by the owners of the adjoining lands in their occupancy of it, and by reference to their conveyances of the adjoining lands, and the records of division of it, and what conversation was had by the plaintiff both at the time of, and subsequent to the making of the contract and conveyance in question.

There was no evidence offered, nor was it claimed by the defendants, that the land in dispute was ever set to any other lot than the one bounding it on the west,—or that it was ever occupied or claimed by any one else than the occupants of the lot deeded ; but the defendants did claim that it was not set in the allotment of the town, (which was many years ago,) to said lot. It appeared that there was, in the allotment of the town a tier of lots on the west side of the creek, but no plan or survey of the town was introduced to show whether the lots bounding the creek run to the channel of the creek or not.

The evidence offered by the defendants was objected to by the plaintiff, and the court excluded it, as having no tendency to show that the tract in dispute ought to be excluded in the estimate of the price of the land ; to this the defendants excepted, and thereupon

submitted to a verdict under the direction of the court to the jury to include the land in dispute in estimating the aggregate price of the land to be paid for under the contract.

G. Harrington for the defendants.

H. R. Beardsley for the plaintiff.

The opinion of the court was delivered, at the circuit session in September, by

ISHAM, J.—The question in this case is one of boundary. The matter in dispute is determined by ascertaining the eastern line of the lot which was conveyed by the plaintiff to George and Samuel Phelps, by his deed of May 4, 1850. The question becomes important in order to determine the number of acres embraced in the deed, for which the defendants are to pay the plaintiff, per acre, the price stipulated in their contract. The lot is described in the deed as being bounded on the "*lake and the creek.*" The plaintiff insists that the creek is limited to the crooked line, *or the Fletcher survey*, as marked on the plan, and that all the land west of that line should be measured to ascertain the number of acres contained in the deed. The defendants, on the other hand, insist that no land was conveyed by the deed any further east than the dotted line on the Phelps survey, as indicated on the plan, which runs on the border of what is termed the hard land, thus excluding the low land lying east of that line. The land thus excluded appears to be low land lying but little above the surface of the lake, and consequently is so much inundated in times of high water that it is rendered of no use for cultivation, and of no great value for pasturage or meadow. The quantity of land in dispute is five acres and one hundred and fifty-two rods, for which the plaintiff seeks to recover the price stipulated to be paid per acre for the whole farm. The court excluded the evidence offered by the defendants, and directed the jury to include the land in dispute in estimating the aggregate price of the land under the contract; thus establishing the eastern boundary of the lot as being on the Fletcher survey, but not so as to embrace any part of the channel of the creek. We are satisfied that the defendants have no reason to complain of that direction of the court to the jury.

As a general rule, if the description of the land in a deed is ambiguous or doubtful, or if the lines and monuments referred to are lost or destroyed, parol evidence of the practical construction given by the parties, by acts of occupancy, recognition of monuments or boundaries, is admissible for the purpose of identifying the land, and in aid of the interpretation of the deed. *Stone vs. Clark*, 1 Met. 378; *Waterman vs. Johnson*, 13 Pick. 261; 1 Greenl. Ev. § 301, note. But where no ambiguity exists, and the parties, in describing the land, have used terms and language in the deed, referring to known, existing and permanent monuments, it is the duty of the court to give to the description and the language of the parties a legal construction; and parol evidence is no more admissible to control its legal effect than it is of any other stipulation of the parties contained in the deed. It is for the court, in such cases, to decide what is embraced in the deed, and to definitely determine its lines and boundaries. Where land is sold and bounded on a river or stream of water above tide-water, the grant extends to the middle of the channel or thread of the stream. This is the legal effect of the conveyance, and it cannot be varied or controlled by parol testimony. *Tyler vs. Wilkinson*, 4 Mason, 397; *Claremont vs. Carleton*, 2 N. H. 369; *Hooper vs. Cumings*, 20 Johns. 91; Angell on Water Courses, § 11-12, and notes. The same principle applies where land is bounded upon an artificial pond, as a mill-pond and the like. *State vs. Gilmanton*, 9 N. H. 461; *Hathorn vs. Stinson*, 1 Fairf. 238. But a different rule prevails where land is conveyed bounded on large natural ponds or lakes; in such case, the grant extends to the water's edge, or if, as observed by Ch. J. Shaw, in *Waterman vs. Johnson*, 13 Pick. 261, the lake or pond have a definite low water line, the grant will extend to low water mark. *Canal Commissioners vs. People*, 5 Wend. 423; *State vs. Gilmanton*, 9 N. H. 491. Such is the legal effect which is given to conveyances of that character.

In relation to the premises in question, so far as they are bounded on the lake, no difficulties have arisen between these parties. The line extends to the edge of the water at low water mark. The same rule, we think, should be applied to land bounded on this creek.

In times of high water on the lake, this creek appears to be but little more than an arm or inlet of the lake itself, as the rise and fall of the water in the creek depends upon the rise and fall of the water in the lake. There is a small rivulet or stream which passes through the centre of this low land to the lake, when it is not overflowed, the bed of which is distinguished by being somewhat lower than the rest of the low land. At low water on the lake, the stream is limited to this channel, and is, to some extent, supplied with water from inland springs. Whether the measurement of the farm should have been extended to the centre of that stream or not, is not the question before us, as the court limited the line to the bank of the stream, and that all west of that line should be included in the measurement in ascertaining the number of acres in the farm; we have no doubt, as it was land conveyed by the deed, the title to which passed to the grantees, and for which, if the plaintiff had withheld the possession, the defendants could have sustained the action of ejectment. That part of the evidence which was offered by the defendants in relation to the character and quality of the land in dispute, was, therefore, properly rejected.

The same principle will exclude the evidence offered in relation to the original allotment of the land, the sale of contiguous land and its occupancy by others, the records of division, and the conversation of the parties at the time of conveyance, &c. *The lake and the creek* mentioned in the deed are existing and natural monuments, and when called for by the deed, control quantity, lines, courses and distances;—as monuments of that character afford the highest and best evidence of the intention of the parties. *Howe vs. Bass*, 2 Mass. 380; *Wendall vs. Jackson*, 8 Wend. 190; *Butler vs. Widger*, 7 Cowen, 723; *Rich vs. Rich*, 16 Wend. 663; 3 Phil. Evid. by Cowen & Hill 1379; 1 Greenl. Ev. § 301, note. Those monuments, therefore, must control the legal effect of this grant; and parol evidence is inadmissible to establish other boundaries, as there is no ambiguity in the deed, nor any uncertainty as to the monuments referred to. We see no error in the ruling of the county court on this subject.

The judgment of the county court is affirmed.

In the District Court of Philadelphia.

CHARLES B. CAMPBELL ET AL. vs. ROBERT B. CABEEN ET AL., GARNISHEES.

1. It is the settled rule in the law of stoppage *in transitu* that movable property sold but not paid for, may, on the discovery of the vendee's insolvency before it has come into his possession, be seized by the vendor.
2. Where A., shipped blooms to Philadelphia, consigning them to B & Co. with written instructions to deliver them "to the order of C," and they were so received and 85 pieces forwarded to C, who subsequently became insolvent, the right of stoppage *in transitu* in A., is gone, inasmuch as the transit was completely at an end when the blooms reached B & Co., who held them subject to C's orders and as his agents; and D., may issue foreign attachment and seize the blooms as C's property.

The following cases were stated for the opinion of the court :

On the seventh or eighth of January, 1855, said garnishees received a letter from H. B. Seidel relative to a quantity of blooms, which he had previously sold to Louis Chevrier, as follows :

Monroe Forge, Jan. 6, 1855.

Messrs. CABEEN & Co. :

GENTLEMEN :—I have to-day sent to the Pine Grove depot 28,079 pounds blooms, in 341 pieces, consigned to you, which please deliver to the order of Mr. L. Chevrier, Trenton.

Very respectfully,

(Signed,)

H. B. SEIDEL.

Said blooms arrived in Philadelphia on the 9th of January, 1855, and were received by garnishees, who immediately sent 85 pieces to Mr. Chevrier, at Trenton, and soon afterwards received from him a letter, as follows, to wit :

Trenton, Jan. 9, 1855.

Messrs. CABEEN & Co., Philadelphia :

GENTLEMEN :—I have a letter of Mr. H. B. Seidel, informing me that he has sent me 341 blooms to your care. Please don't send them by railroad. I think very shortly we will have a boat running. First time I shall go to Philadelphia, I will call on you.

Yours, most respectfully,

(Signed)

L. CHEVRIER.

To which the garnishees replied :

Philadelphia, Jan. 9, 1855.

L. CHEVRIER, ESQ.:

DEAR SIR:—We enclose railway receipts for 85 pieces blooms, (Seidel's,) which had been sent when yours of this date came to hand. The remainder will be held subject to your order.

Yours,

CABEEN & CO.

Mr. Chevrier wrote again on the 24th of January, 1855, as follows :

Trenton, Jan. 24, 1855.

Messrs. CABEEN & Co., Philadelphia:

GENTLEMEN:—I believe there is a boat loading for Trenton, (Chestnut street wharf.) Would you be so kind as to make some inquiries, and if possible, send me the balance of blooms.

Please send me your bill of expenses, Mr. H. B. Seidel separate.

Yours, most respectfully,

(Signed)

L. CHEVRIER.

And the garnishees replied on the day following, to wit:

Philadelphia, Jan. 25, 1855.

L. CHEVRIER, ESQ., Trenton, N. J.:

DEAR SIR:—Yours of 24th instant is at hand. The only Trenton packet now here has a full cargo on board, and the captain says unless the weather softens he will not attempt to go up. Please get the captain of the next vessel that comes down to call on us when he is ready to take in your blooms.

Yours, respectfully,

CABEEN & CO.

A foreign attachment was issued at the suit of said plaintiff on the 26th day of January, 1855, to March term 1855, No. 24, against Louis Chevrier, which on the 26th of January, 1855, was served upon said garnishees, who immediately notified Mr. Seidel and Mr. Chevrier of the fact by letter, as follows :

Philadelphia, Jan. 26, 1855.

H. B. SEIDEL, ESQ.:

DEAR SIR:—Eighty-five pieces out of the 341 pieces of blooms sent to our care for L. Chevrier were sent to him by railroad, when

an order came from Mr. Chevrier to hold on to the remainder till the vessels commenced running, and we advised him that we would hold them subject to his further instructions, and they have remained in our hands till this time.

This afternoon we have had served on us a writ of foreign attachment, at the suit of Chas. B. Campbell & Co., which please note and take such steps in the matter as may be best for your interest.

We hope to hear that you have before this received a satisfactory settlement for the blooms from Mr. Chevrier.

Yours, truly, CABEEN & CO.

We will be glad to do all we can for your interest in this matter, if you will let us know what we can do.

Philadelphia, Jan. 26, 1855.

Mr. L. CHEVRIER :

DEAR SIR:—We have this afternoon had served on us a writ of attachment, at the suit of Chas. B. Campbell & Co., for the blooms in our hands received from Mr. Seidel for you, which please note, and take such action in the matter as may be advisable.

We have notified Mr. Seidel of the above.

Yours, respectfully, CABEEN & CO.

In answer to their letter to Mr. Chevrier, they received the following, to wit :

Trenton, Jan. 27, 1855.

Messrs. CABEEN & Co.:

GENTLEMEN:—I have received this morning your favor of yesterday. I am so vexed at the proceeding of Campbell that I can hardly write. You yourselves know that the blooms in your possession are the blooms of Mr. Seidel, and his property. I am writing to Messrs. Campbell. I enclose a copy of my letter to them, and also send a copy to Mr. Seidel. Yours, most respectfully,

(Signed) L. CHEVRIER.

Copy of letter enclosed.

Trenton, Jan. 27, 1855.

Messrs. C. B. CAMPBELL & Co.:

GENTLEMEN:—What have you done? I have just received a letter of Messrs. Cabeen & Co., informing me that you have made an

attachment on blooms at Messrs. Cabeen & Co.'s, thinking they are mine. You have ruined me, and done a great injury to yourselves.

The blooms belong to Mr. Seidel. Messrs. Cabeen has written to him, and I am also writing to him, to take the necessary steps to prevent your proceeding any further. It is true that I could have had those blooms, that I had some of them, but as long they are in Messrs. Cabeen and Co.'s hands they are the property of Mr. Seidel, and he can do with them what he pleases, you or me notwithstanding. I never had a bill of them, nor made a cent advance on them. You have been in the commission and forwarding business long enough to know more about it. Will go to Philadelphia on Monday; will call and see you.

Yours,

(Signed)

L. CHEVRIER.

On the 1st of February, 1855, they received from Mr. Seidel the following notice:

Philadelphia, Feb. 1, 1855.

Messrs. CABEEN & Co.:

GENTLEMEN:—I am informed that Mr. L. Chevrier is in embarrassed circumstances. You will therefore not deliver to his order the blooms I consigned to you on January 6, 1855, or whatever portion of them may yet be in your possession.

Respectfully, yours,

(Signed)

H. B. SEIDEL.

Messrs. Cabeen & Co. are dealers in iron, and general receiving and storing agents for the iron trade, and keep a general depot for receiving, storing and delivering iron. Said Chevrier was insolvent when the order to stop the delivery of the blooms was given.

The whole of said blooms, with the exception of the 85 pieces delivered to the said Louis Chevrier as above mentioned, are still in their possession. If the court should be of opinion with the plaintiffs, then judgment to be entered in favor of the plaintiffs—that they have execution against the personal property of said Louis Chevrier, in the possession of said garnishees, for the amount of their judgment in said suit of foreign attachment, first paying to defendants thirty dollars (\$30) due for storage and their reasonable

expenses in the proceeding; if otherwise, then judgment to be entered in favor of defendants.

The opinion of the court was delivered by

STROUD, J.—This case is to be regarded as between Seidel as vendor, and Chevrier as vendee. For the plaintiffs are but creditors of Chevrier, proceeding by foreign attachment, and according to *Hays v. Monille*, 14 P. S. R. 48, occupy no better position than Chevrier himself. Cabeen & Co. claim no special interest in the goods. The relation which they hold is that of a mere depository.

The principle of law on which the right of stoppage *in transitu* depends, is very simple, and as well settled as any part of commercial jurisprudence. Movable property sold, but not paid for, may, on the discovery of the vendee's insolvency before it has come into his possession, be seized by the vendor. All the decisions agree in this. The earlier ones require that actual possession should be obtained by the vendee to prevent the right of stoppage, and so restricted, the right was easily ascertained. But what is styled a constructive possession is now universally admitted as a part of the law. In determining what in each case is to be deemed a constructive possession, is frequently a question of much difficulty.

Where, as in the present case, the whole evidence is in writing, the question is to be determined by the court. *Fox v. Clifton*, 9 Bing. 115; *Collis v. Stack*, 1 Excheq. Rep. 605, 609.

The case stated, may be regarded as consisting entirely of written evidence. There is no allusion to former transactions between the parties of any kind, nor indeed does it appear that they had ever had any. We have a bald transcript of letters; none of which were between Seidel and Chevrier—the vendor and vendee—but between each of them and Cabeen & Co., the garnishees.

In what light are Cabeen & Co. to be regarded in respect to the goods? If Seidel's directions were that they should forward them to Chevrier, all the cases show that the right of stoppage existed so long as this relation existed. The transit on this supposition must have been between Monroe Forge, where Seidel had his iron-works,

and the city of Trenton, the residence and place of business of Chevrier. But does the correspondence show that such was the meaning of the parties to it?

The transaction dates from the letter of Jan. 6, 1855, from Seidel to Cabeen & Co. It consists of a few lines, "I have to-day sent to the Pine Grove depot 28,079 pounds blooms, in 341 pieces, consigned to you, which please deliver to the order of Mr. L. Chevrier, Trenton."

Did this authorize Cabeen & Co. to forward the goods to Chevrier without receiving any instructions from him? It plainly did not. The directions are explicit, "deliver to the order of L. Chevrier, Trenton." The goods were not to be sent to Trenton, but to that or any other place which he might desire. Or they might be left where they were, should Chevrier so request, and Cabeen & Co. consent to keep them. This would be, substantially, a delivery to the order of Chevrier. And this was the understanding of the parties, evidenced by Chevrier's letter of January 9, and Cabeen & Co.'s reply on the same day, which concludes, "the remainder (*i. e.* of the blooms) will be held subject to your order."

The goods had, by this correspondence, been placed in the very condition expressed by Lord Ellenborough, in *Dixon v. Baldwin*, 5 East, 186,—they "had so far gotten to the end of their journey, that they waited for new orders from the purchaser to put them again in motion—to communicate to them another substantial destination, and that without such orders they would continue stationary." This, as the court there decided, was the end of the transit.

Chancellor Kent adopts the same test. "The point of inquiry," says he, "is whether the property is to be considered as still in its transit; for if it has once fairly arrived at its destination, so as to give the vendee the actual exercise of dominion and ownership over it, the right of stoppage is gone." 2 Kent, 545.

Dixon v. Baldwin, is a leading case on the doctrine of stoppage *in transitu*. It has been so regarded everywhere.

In *Wentworth v. Outhwaite*, 10 M. & W. 436, Baron Parke, speaking of *Dixon v. Baldwin*, says, "Lord Ellenborough lays down the doctrine that the transit is completely at an end when the

goods arrive at an agent's who is to keep them until further orders of the vendee."

This is precisely our case, according to the literal import of Seidel's letter of Jan. 6, 1855, to Cabeen &

I am not aware that the authority of *Dixon v. Baldwin* has been impugned or doubted.

In England it has been followed in numerous cases. Bales of flax, sold by A., in London, to B., residing at Mill, were addressed to "B., Mickley," and then shipped under a bill of lading making them deliverable "at Boroughbridge for B., Mickley Mill." The bales were sent from Hull to Boroughbridge, by water carriage, and deposited in the warehouse of C., a party unconnected with the transaction. C. was in the habit of receiving goods for B., and retaining them at B.'s risk, and without charging warehouse rent, until they were taken by B., or delivered to other persons by his orders; it was held that the transit was at an end, and the bales could not be claimed by A., upon the insolvency of B., although B. had not acted as owner. *Dodson v. Wentworth*, 1080.

Valpy v. Gibson, 4 Common Bench, 837, and *Outhwaite*, 10 M. & W. 436, are strong cases, illustrating the same doctrine.

In this country, *Sawyer v. Joslin*, 20 Verm. Rep., 100, the whole subject of stoppage *in transitu* was examined, and the court, in great care, adopts the principle of *Dixon v. Baldwin*, in its full extent. Their goods were shipped at Troy, N. Y., directed to the vendee, at Vergennes, Vermont, and were landed upon the wharf at Vergennes, which was half a mile from the vendee's place of business. It was the custom in such cases, for the vendee to receive them at the wharf, and transport them to the places of business. No one was charged with the care of the goods whilst they remained upon the wharf. The transit was held to be at an end when the goods were placed on the wharf.

In *Hitchcock v. Covill*, 20 Wend. 167, we have the same principle applied. A merchant of the city of New York, sold goods

who resided at Willardsburg, in the State of Pennsylvania. Graves directed the goods to be shipped on board a canal or lake boat, bound to the village of Havana, N. Y. They were boxed and directed to him, at Willardsburg, and put on board a canal boat, which in due course arrived at Havana. The course of business was to deposit goods brought by canal boats to Havana, (which was then at the head of navigation in the direction of Willardsburg,) in a warehouse there, where they remained until sent for by the owners at Willardsburg. Immediately after the goods in question had been deposited in the warehouse, Covill, as sheriff, seized them under an execution against Graves. The distance between Havana and Willardsburg was upwards of thirty miles. Four days after the goods had been placed in the warehouse, Graves came on with his team to take them away.

The Supreme Court was of opinion that the transit was at an end when the goods reached Havana and were landed.

In the Court of Errors, a different view was taken, chiefly, if not solely, upon the assumption that the warehouse-man was a middle man between the vendor and vendee, and whilst the goods remained in his charge, the right of stoppage existed. It is unnecessary for us to examine whether the facts of the case warrant this inference. The Court of Errors thought they did, and if so, the transit was certainly not complete.

There is nothing, therefore, in this decision, which militates at all with the principle of *Dixon v. Baldwin*. Indeed, the court in express terms declares that *Dixon v. Baldwin* "was rightly decided," p. 613.

Judgment is to be entered for the plaintiffs in the manner mentioned in the case stated.

RECENT ENGLISH DECISIONS.

In the Exchequer Chamber, November 29, 1856.

KINGSFORD AND ANOTHER vs. MERRY.¹

1. The plaintiffs, the owners of a large quantity of acid in barrels, employed certain brokers to sell it. The brokers contracted with B for the purchase of part, and gave him an order on the plaintiffs that they should deliver to him or his order a certain number of tons of acid. B sold his interest in this contract to E, who sold it to L. A bought the same of L, falsely representing himself as agent for V, and thereby, on pretence of inspecting the acid, obtained from L, the brokers' orders on the plaintiffs for the quantity. These orders had been endorsed over and passed from one purchaser to another, and when delivered by L to A were endorsed by L specially deliverable to himself. A presented the brokers' orders to the plaintiffs, and stating that he had purchased the acid of L on his own account, though nominally for V, induced the plaintiffs to give him a transfer or delivery order on the wharfinger in whose warehouse the acid was lying, authorizing the transfer into A's name of certain specific casks of acid, amounting to the quantity in the brokers' orders mentioned. The wharfinger thereupon transferred the specified casks of acid into A's name. A immediately borrowed money of the defendant, and pledged the casks of acid with him as a security for the repayment, handing over to the defendant the warrants which he had had made out, by the means of which the defendant obtained possession of the acid:—Held, that, as A obtained the delivery order from the plaintiffs by the false and fraudulent representation that he had purchased acid by a sub-sale from a purchaser from the plaintiffs, there was no privity of contract between the plaintiffs and A, consequently that the latter could not convey a good title in the casks of acid to the defendant, though a bona fide pawnee for value, but that the plaintiffs might recover the acid back from him in trover.
2. When the court below has refused a rule, the proper time for taking a preliminary objection to the right of the appellant to appeal is on showing cause after the rule nisi has been granted in this court on the case stated. It is most convenient that cause be shown in the first instance. Only one counsel will be heard on each side.

This was an appeal by the plaintiffs against the decision of the Court of Exchequer² refusing to grant a rule to enter a verdict for them, pursuant to the leave reserved at the trial.

¹ 26 Law J. Exch. 89. Coram Coleridge, J., Wightman, J., Cresswell, J., Erle, J., Williams, J., Crompton, J., Crowder, J. and Willes, J.

² 25 Law J. Rep. (n. s.) Exch. 166.

The action was trover for three tons of tartaric acid.

Pleas—not guilty ; and plaintiffs not possessed. Issue thereon.

The cause was tried, before Pollock, C. B., at the London Sittings after Michaelmas term, 1855, when the following facts were proved by the witnesses for the plaintiffs :—The plaintiffs were manufacturing chemists at Bow Common, in the county of Middlesex, and the defendant was a drug-broker, carrying on business at Fenchurch street, in the city of London. In April, 1853, Messrs. Jones, Thompson & Co., of Liverpool, sold for the plaintiffs six tons of tartaric acid, of which two tons were to be delivered in the next November, and they sent to the plaintiffs the following sold note:—

*“ Bank Exchange Buildings,
Liverpool, April 25th, 1853.*

“Messrs. Kingsford & Swinford.—We have this day sold for you the following goods, six tons tartaric acid at 1s. 4d. per lb., as under,

Viz., to selves,

One ton to be delivered in London in all September, 1853.

To Mr. James Roe,

One ton	do.	October,	do.
Two tons	do.	November,	do.
Two tons	do.	December,	do.

Customary allowances—Payment, cash, in 14 days from date of each invoice, less 5 per cent. discount.

Respectfully yours,

“JONES, THOMPSON & Co., *Brokers.*”

On the 14th of October, 1853, Messrs. Gray & Co., of Mincing Lane, brokers, sold for the plaintiffs two tons of tartaric acid, to be delivered also in the month of November, and the following was the sold note sent by them to the plaintiffs :—

“ London, 14th October, 1853.

“Messrs. Kingsford & Swinford.—We have this day sold for your account two tons tartaric acid crystals, of good merchantable quality, at 1s. 9d. per lb., to be delivered in November next. Cus-

tomary conditions—Prompt fourteen days after delivery; discount 5 per cent. Brokerage 1 per cent.

Your obedient servants,

“GRAY & Co.”

In pursuance of these contracts, invoices were, on the 1st of November, 1853, sent in the usual course by the plaintiffs to, and received by, Messrs. Jones, Thompson & Co., and Gray & Co., about the middle of the same month. After the sending of the invoices, two delivery orders were left at the counting-house of the plaintiffs by a clerk of Anderson, which were the only documents the plaintiffs received to vouch for the representations of Anderson as to his being the owner of the acid before they transferred it to his name, as hereinafter mentioned. One of the delivery orders was in the following form:—

“*Liverpool, 4th November, 1853.*

“Messrs. Kingsford & Swinford.—Please to deliver to Mr. Thos. Broomhall, or order, one ton tartaric acid, part of two tons invoiced 1st inst., on payment of 149*l.* 2*s.* 11*d.*, and oblige yours,

Respectfully,

“JONES, THOMPSON & Co.”

“Bow Common, London.”

This order was, at the time it was so left at the counting-house of the plaintiffs, endorsed as follows:—

“Please deliver to my orders given out and furnish me with separate weights of casks.

THOMAS BROOMHALL.”

“155 Fenchurch Street, 10th Nov. 1853.”

At the foot of this last mentioned endorsement are the words “delivered to Anderson,” which the plaintiff C. Kingsford stated was a private memorandum of his own. The other delivery order was in the following form:—

“*London, Nov. 12, 1853, Mincing Lane.*

“To Messrs. Kingsford & Swinford.—Please deliver to Mr. T. Broomhall or order the undermentioned goods: charges from

———, to be paid by bearer. Two tons tartaric acid crystals. Mark (Lot or No.) Two tons tartaric acid crystals. Invoiced as 4,480 lb. net.

“GRAY & Co.”

This order was, at the time it was so left at the counting-house of the plaintiffs, endorsed as follows:—

“Thomas Broomhall, deliver to Mr. W. Leask.—John Ellis.

“Please deliver at Custom-house Quay, to my sub-order.

“WILLIAM LEASK.”

The said William Leask was a broker in the city of London. These two delivery orders, with the endorsements thereon as above, except the memorandum “delivered to Anderson,” were about the middle of November, 1853, left at the counting-house of the plaintiffs by a clerk of Anderson, who then was carrying on business as a merchant in the city. After the delivery orders had been so left at the plaintiffs’ counting-house, and before the 21st of November, Anderson called upon the plaintiffs, and saw the plaintiff C. Kingsford, and told him that he had purchased the “three tons tartaric acid” mentioned in the delivery orders from Leask, and requested him to deliver them to his order at Custom-house Quay. On the faith of Anderson’s statement that he had purchased the three tons from Leask, the plaintiff C. Kingsford directed one of their clerks to deliver them according to Anderson’s request, and the “three tons tartaric acid” were delivered on the 21st of November, 1853, at Custom-house Quay; but, by a mistake of the clerk, they were made deliverable to the order of the plaintiffs themselves, instead of to Anderson’s order. On the 29th of November, Anderson again called on the plaintiff, C. Kingsford, and on his second representation that the acid was his, the said plaintiff gave to him an order, of which the following is a copy:—

“*Chemical Works, Bow Common,*

“*London, 29th Nov., 1853.*

“Mr. Blake, East Warehouse, Supt., Custom-house Quay.

“Please transfer to the order of Mr. Anderson, 180-2—186-191, nine casks of tartaric acid—charges to him.

“KINGSFORD & SWINFORD.”

Anderson, on the said 29th of November, took the last mentioned order to Messrs. Hall at the Custom-house Quay; and the said acid was thereupon and then transferred by them into his name, and thenceforth held by them to his order and on his account. Leask, (who had, previously to the year 1853, had many transactions in business with Anderson, both on his own account and for other people, and, amongst others, for Van Notten & Co.,) on the 27th of October, 1853, was directed by Anderson (who at that time, and until after his arrest, was believed by Leask to be the agent of and acting for Van Notten & Co.) to purchase, and Leask did accordingly purchase, eight tons of tartaric acid for Van Notten & Co., four tons to be delivered in November, and four in December. These eight tons were purchased by Leask of the John Ellis, whose name is endorsed on one of the delivery orders set forth above. The sold note and counterpart of the bought note of Leask, the broker, are as follows:—

“ October 27th, 1853.

“Sold on account of John Ellis,

“8 tons best tartaric acid crystals, at 2s. 6d. per lb., to be delivered 4 tons November, and 4 tons December.

“14 days after delivery, 5 per cent.

“P. & C. VAN NOTTEN & Co.”

“Bought for P. & C. V. N. 8 tons at 2s. 6d. Customary allowances; prompt 14; discount 5; deliverable November and December, 1853.

“W. LEASK.”

In part performance of the last-mentioned contract, the said John Ellis, in November aforesaid, delivered to W. Leask orders for the delivery of three tons of tartaric acid, that is to say, one for the delivery of two tons, and one for the delivery of one ton. The one for two tons is the delivery order set forth above. After the receipt of the delivery orders by Leask, Anderson, whom Leask then thought was acting as agent for Van Notten & Co., asked Leask to let him inspect the acid, and Leask having first endorsed both the orders specially deliverable to himself gave them so endorsed to Anderson

for the purpose of enabling him to inspect the acid mentioned therein, and for that purpose only. Leask never authorized Anderson to take possession of the acid, or to have it delivered at Custom-house Quay for himself, or to say that he had bought it. Anderson was not authorized by Van Notten & Co. to purchase the acid for them, and they repudiated it. On the 20th of December, 1853, Anderson was apprehended on a charge of forgery. On the 21st of the same month he was duly adjudicated a bankrupt. On the 26th of November, 1853, Leask sent to the plaintiffs the following notice:—

“14 *Eastcheap*, Nov. 26th, 1853.

“Messrs. Kingsford & Co.

“Gentlemen,—I find you have not sent the ‘tartaric’ to Custom-house Quay, deliverable to my order; please to do so at your earliest convenience.

“Yours respectfully,

“WILLIAM LEASK.”

On the 6th of December, Leask again sent to the plaintiffs, requiring the three tons of tartaric acid to be sent to Custom-house Quay to his order. After several subsequent applications the plaintiffs sent the acid. On the 7th of December the plaintiffs served Messrs. Hall, the proprietors of the wharf at Custom-house Quay, with a notice not to transfer from Anderson’s name, or deliver without their instructions, the nine casks of tartaric acid there lying to his order. In reply, Messrs. Hall informed the plaintiffs that warrants for the acid had been made out and delivered to the defendant. On the 28th of November, 1853, the defendant was, for the first time, introduced to Anderson, who, on the following day, applied to him to advance money on some tartaric acid, which the defendant consented to do upon the usual terms of advances made by brokers to merchants, and an authority to sell, in default of repayment on the 1st of February, 1854, which authority to sell was subsequently altered by giving the defendant free liberty to act as regarded sales. Anderson then stated to the defendant that he had forty-four casks of tartaric acid, and asked the defendant whether he would have the warrants for the said acid made out in his own name,

or in Anderson's; whereupon the defendant required them to be made out in his own name. And Anderson, on the same day, accordingly procured warrants for the said forty-four casks of acid from the said Messrs. Hall, in the name of the defendant, and delivered the said warrants (including the nine casks sent by the plaintiffs) to the defendant in pledge, and as a security for the sum of 2,000*l.* then advanced to him. In making the said advance the defendant acted *bona fide*, and in the ordinary and usual course of business, and he had not, either at the time he received the warrants and made the advance, or at the time he received and sold the acid, any notice or knowledge that the acid, or any part thereof, or the warrants, or any of them, were or had been claimed by the plaintiffs, or belonged to them, or that Anderson had not authority or power to deal with or pledge the acid or warrants. By means of the warrants the defendant obtained possession of the forty-four casks of tartaric acid, including the nine casks sent to the Custom-house Quay by the plaintiffs. The defendant sold thirty-four casks of the acid, including the nine casks, by public auction, on the 24th of January, 1854, and endorsed warrants for the same to the purchasers thereof, to whom the acid was accordingly delivered.

At the close of the plaintiffs' case, the Lord Chief Baron directed the jury that, upon the facts, they must find a verdict for the defendant, but reserved leave for the plaintiffs to move to enter a verdict for them for 680*l.*, if the court, being at liberty to draw any inferences that, and to deal with the facts as, a jury would be authorized to do, should be of opinion that the plaintiffs were entitled to the verdict.

Sir F. Theiger, for the defendant, the respondent, (Nov. 26.) There is a preliminary objection that no appeal will lie in this case.

Hugh Hill, for the plaintiffs, the appellants. The defendant has agreed to the special case. By settling that with the plaintiffs, he has waived any preliminary objection. He should have refused to settle the case.

[COLERIDGE, J.—Settling the case does not preclude the defendant from afterwards relying on a preliminary objection.]

Sir F. Theiger.—It is important to know whether a preliminary

objection ought to be taken before the party who failed to get the rule below applies to the court here or after the court here has granted a rule *nisi*.

[COLERIDGE, J.—We think a preliminary objection may be taken in showing cause to the rule *nisi*.]

Sir F. Theisiger.—Will more than one counsel be heard for each party?

[COLERIDGE, J.—Only one counsel can be heard on each side.]

Sir F. Theisiger.—May cause be shown in the first instance?

[CRESSWELL, J.—It is the most convenient course that cause should be shown in the first instance.]

Hugh Hill.—The appellants, the plaintiffs below, apply for a rule to enter a verdict for the plaintiffs pursuant to the leave reserved. The preliminary objection intended to be urged on the part of the defendant is that the leave reserved depends upon a conclusion of fact to be drawn by the court below upon the evidence, and that no appeal lies on a question of fact. By way of anticipation, it may be answered, that there is an express direction in law by the Chief Baron that the defendant is entitled to the verdict. The Common Law Procedure Act, 1854, s. 34, says: "In all cases of rules to enter a verdict or nonsuit upon a point reserved at the trial, if the rule to show cause be refused or granted, and then discharged or made absolute, the party decided against may appeal." This is the case of a rule refused where a point has been reserved at the trial. The circumstance that the court is to be at liberty to draw any inference of fact that a jury might draw does not neutralize the effect of the leave reserved upon the point of law. A bill of exceptions might have been tendered to this ruling.

Sir F. Theisiger was then called upon to support his preliminary objection.—This case is not one within section 34 of the above act. That section applies only to a case where a simple point of law is reserved, not where a point of law is mixed up with facts. The Chief Baron reserved the point, if the court on the facts should be of opinion that the plaintiff was entitled to a verdict. The plaintiff, therefore, was only entitled to a verdict if, upon the facts, the court thought him entitled. No appeal will lie against the decision of the court below on the facts.

[CRESSWELL, J.—The point was, whether the law upon the existing state of facts gave the plaintiff the right to the verdict. Then, in order to prevent any difficulty as to any fact not being sufficiently found, it was agreed that the court should be at liberty to draw any inferences which a jury might draw.]

[COLERIDGE, J.—We are all of opinion that we may hear the appeal.¹]

Hugh Hill.—The learned Chief Baron was wrong in directing a verdict for the defendant. It is not intended to impugn the law laid down in *White v. Garden*,² which shows that where one is induced to sell an article by the fraudulent representation of the purchaser, and that purchaser parts with the property to a *bona fide* holder for a valuable consideration, without notice of the fraud, the seller cannot recover the property back. But that rule proceeds upon the principle that a contract so obtained by fraud is not absolutely void, but only voidable, and that if the seller does not elect to avoid it before third parties are interested, he cannot do so afterwards. But the great distinction to this case is, that here the relation of vendor and vendee did not subsist between the plaintiffs and Anderson, though the case is so treated in the court below. There was no contract at all between them. There was no privity. No case goes so far as to show that a person obtaining property from another by a fraudulent representation without a contract, can convey a good title to a *bona fide* purchaser from him. The plaintiffs, on Anderson's naked lie that he was the buyer, give him the delivery order on the wharfinger. In *Boyson v. Coles*,³ it was held that possession of the transfer orders by the consent of the owners of the goods did not enable the broker to deal with the property as the owner of it. The allowing the acids to be transferred into Anderson's name, in the wharfinger's books, does not in any way change the property in the goods: *Jenkyns v. Usborne*,⁴ *M'Ewen v. Smith*,⁵ *Dyer v.*

¹ The court expressed an opinion that it would be convenient in future that the case stated for the appeal should mention where the case was reported in the court below.

² 10 Com. B. Rep. 919; s. c. 20 Law J. Rep. (N. S.) C. P. 166.

³ 6 M. & S. 14.

⁴ 7 Man. & G. 678; s. c. 13 Law J. Rep. (N. S.) C. P. 196. ⁵ 2 H. L. Cas. 309.

Pearson,¹ *Williams v. Barton*.² The defendant acted incautiously in advancing money to Anderson without ascertaining the title to the property.

COLERIDGE, J.—We grant a rule *nisi*.

Sir F. Thesiger showed cause.—The contracts for the sale of the acid, entered into by the plaintiffs' brokers on their behalf, were floating contracts. The brokers' delivery orders on the plaintiffs passed from hand to hand until the time for payment came, and the party who, when the time of payment arrived, presented himself with the brokers' orders and tendered payment, was entitled to receive the acids.

[CROMPTON, J.—You treat these contracts as assignable at law. They are contracts to supply, not to sell, any particular goods. No specific property is assigned until you come to the dealing with Anderson.]

It is not necessary to contend that there was an actual sale to Anderson by the plaintiffs. If there was a transfer by them to him, it is sufficient to enable him to confer a good title.

[ERLE, J.—It was a transfer by the plaintiffs to Anderson under a mistaken notion that he had the property in the goods.]

In Story on Sales of Personal Property, it is said, sec. 200: "There is, however, a distinction which obtains in cases where sales are made of property to which the vendor has obtained a title by fraudulent means, and cases where the vendor has no title, and has obtained possession of the goods by felony or chance, or who holds them as a mere bailee. In the former class of cases, when the vendor has obtained his title by fraudulent representations or artifices, he can make a valid sale of the goods to a bona fide purchaser for a valuable consideration, so as to deprive the original purchaser of his power to reclaim them."

[CRESSWELL, J.—All that passage assumes the existence of a contract.]

*Stevenson v. Newnham*³ affirms the same law. Where a party has put another in possession of the *indicia* of property, so as to

¹ 8 B. & C. 38.

² 3 Bing. 139.

³ 18 Com. B. Rep. 285; s. c. 22 Law J. Rep. (N. S.) C. P. 110.

enable him to represent himself as owner, and that other sells the goods, the original possessor cannot recover the goods back. *Boyson v. Coles* does not govern this case. In *Lucas v. Dorrien*,¹ where the owners of the goods gave a written order on the wharfinger for delivery, and this was communicated to the wharfinger, who assented to it, the property in the goods was held to pass.

[CRESSWELL, J.—In that case there was a bona fide vendee. You must contend that every one into whose name property is transferred at a wharf, has power to dispose of it.]

[CROMPTON, J.—Would not the case be the same if Anderson, by some misstatement, had got the actual goods from the plaintiffs?]

It may be further urged, that as between the plaintiffs and Anderson there was an actual sale. They accept his statement that he was the purchaser. He would have been estopped from saying he was not. They might have sued him for the price: *Hill v. Perrott*,² *Biddell v. Levy*.³

[WIGHTMAN, J.—Suppose it had all been genuine, and there had been a sub-sale from Van Notten to Anderson, there would have been no privity between him and the plaintiffs.]

It will be a great evil to the mercantile world if parties who buy of persons in Anderson's situation are bound to investigate the title to the goods. When one of two innocent parties must suffer by a fraud, it is a principle of law that he whose negligence or credulity has given opportunity for it must be the party to bear the loss. *Root v. French*.⁴ Here the plaintiffs are the parties guilty of carelessness and credulity, and therefore they ought to suffer, not the defendant.

Hugh Hill replied.

Cur adv. vult.

Judgment was now delivered by

WIGHTMAN, J.—The judgment of the Court of Exchequer appears to have been founded upon the assumption that the plaintiffs would have been warranted, by the circumstances stated in the case, in

¹ 7 Taunt. 278.

² 3 Taunt. 274.

³ 1 Stark. 20.

⁴ 13 Wendel's (American) Rep. 570.

treating the transaction between them and Anderson as a contract which, by reason of the fraud of Anderson, they might disaffirm if they pleased, or affirm, and proceed as for goods sold and delivered; but that their right to disaffirm was subject to any intermediate right which the *bona fide* vendee or pawnee from Anderson might acquire. We are, however, of opinion that on the facts stated in the case, the plaintiffs and Anderson never did stand in the relation of vendors and vendee of the goods, and that there was no contract between them which the plaintiffs might either affirm or disaffirm. It is stated in the evidence set out in the case, that the plaintiffs gave a delivery order to Anderson, and dealt with him as they did, not as purchasing the goods from them, but as having purchased them from Leask, as falsely represented by him, giving him credit as a sub-contractor by purchase from a contractor with them. There was no privity of contract between them and Anderson, and it was only as representing himself as claiming under Leask that they gave him by the delivery order the means of possessing the goods. Such a delivery, under the circumstances of this case, would no more pass the property in the goods than a delivery to an agent or servant of Leask would pass the property to such agent or servant. But upon the facts it appears that Anderson had no authority from Leask to receive, but only to inspect the goods, and that Anderson obtained the transfer to himself without authority, and by false pretences. The mere possession, with no further *indicia* of title than a delivery order, is not sufficient to entitle a *bona fide* pawnee of a person fraudulently obtaining possession from the true owner to resist the claim of the latter in an action of trover. Our judgment, therefore, reversing the judgment of the Court of Exchequer, is, that the verdict be entered for the plaintiffs upon the leave reserved.

Judgment accordingly.

SYNOPSIS OF RECENT CROWN CASES.¹

Bigamy.—Upon the trial of an indictment for bigamy, it appeared that the prisoner's husband had been absent from her for seven years next preceding the second marriage, and there was no evidence that she knew him to be living at the time of the second marriage. The jury found that they had no evidence of the prisoner's knowledge of her husband being alive, but that they were of opinion she had the means of acquiring that knowledge if she had chosen to make use of them. The Court held, that upon this finding of the jury a conviction could not be supported. *Reg. vs. Briggs*, 2 Jur., N. S., part 1, p. 1195.

Embezzlement.—A conviction for embezzlement was supported upon the following state of facts:—It was the prisoner's duty, when he received moneys on account of his masters, to enter the amount to the credit of the customers in a day-book, to make extracts from this book, and then to enter the whole amount on the credit side of a bankers' deposit account, and to pay in the amount to the credit of his masters with their bankers; he afterwards was to post the amounts in a ledger, which contained the accounts of the different customers. The prisoner received an amount, and appropriated it to his own use. The only entry he had made of this amount was in the ledger, where he had placed it to the credit of the customer. *Reg. vs. Lister*, 2 Jur., N. S., part 1, p. 1124.

The prisoner was employed at a railway station belonging to four different companies. The servants at this station were appointed and paid, and might be dismissed, by a committee of directors of the several companies. It was the prisoner's duty to pay over money received for parcels arriving by the trains of the different companies to the chief clerk, who then paid over such moneys to the cashier of the committee, who kept a separate account for each company, and paid the money over directly to the company to whom it belonged. The prisoner was charged in different counts of an indictment for embezzlement, as being the servant of the particular company whose money he had embezzled, of the four companies, of the committee, and of the station-master. The Court held that at all events he was properly charged as the servant of the four companies. *Reg. vs. Bayley*, 2 Jur., N. S., part 1, p. 1171.

Evidence.—In order to render a declaration by a deceased person admissible in evidence, he must have been, at the time he made it, under apprehension of death; such apprehension, however, need not be of death within

¹ 3 Jur. 279, 280, 291, 292.

a particular time ; it must be made under the impression that he is about to die after comparatively a short lapse of time, and under the clear conviction that he will not recover. *Reg. vs. Reany*, 3 Jur., N. S., part 1, p. 191.

False Pretences.—Where the pretence is known to the prosecutor to be false, but he still parts from his money under a desire to entrap the defendant, this is not an obtaining money by false pretences. *Reg. vs. Mills*, 3 Jur., N. S., part 1, p. 447.

We have next to direct the attention of our readers to two most important decisions. We refer to *Reg. vs. Sherwood*, 3 Jur., N. S., part 1, p. 547, and *Reg. vs. Bryan*, 3 Jur., N. S., part 1, p. 620. In the first, the Court, consisting of eleven of the learned justices, unanimously held, that a false representation of the *quantity* of an article sold and delivered is a false pretence within the meaning of the statute. The facts were as follows :—The defendant agreed to deliver a load of coals at a certain price per cwt.; he accordingly delivered a load, to his knowledge weighing 14 cwt. He afterwards falsely and fraudulently represented that the quantity he had delivered weighed 18 cwt., and that he had seen them weighed, and thereby obtained the price of 18 cwt. A conviction upon these facts was upheld. In *Reg. vs. Bryan*, ten of their Lordships (Willes, J., and Bramwell, B., being of a different opinion) held that a false representation of the *quality* of an article, made in the course of a bargain or contract, is not a false pretence within the statute. The defendant had falsely represented that certain plated spoons which he offered in pledge “were of the best quality; that they were equal to Elkington’s A; that the foundation was of the best material; and that they had as much silver on them as Elkington’s A.” By these representations the prosecutors were induced to advance money on the spoons. But the majority of the Court held, that a conviction for obtaining money by false pretences could not be sustained.

Nuisance.—To deposit and keep in a warehouse, situated in a populous district, large and excessive quantities of “wood naphtha,” is a nuisance at common law, although the greatest care may be used in the warehouse to prevent ignition. *Reg. vs. Lister*, 3 Jur., N. S., part 1, p. 570.

Removal of Corpse.—It is a misdemeanor at common law to remove a corpse which has been buried in ground belonging to a congregation of Protestant Dissenters, although the act may have been done from motives of filial affection and religious duty. *Reg. vs. Sharpe*, 3 Jur., N. S., part 1, p. 192.

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NOTES ON THE LAW OF USURY IN PENNSYLVANIA.

Blackstone gives as the definition of usury that it is an *unlawful contract* upon the loan of money, to receive the same again with exorbitant increase, 4 Bl. Com. 156. That a corrupt agreement is necessary to constitute the offence would seem to be the uniform ruling of all the English cases. In *Hill vs. Montague*, 2 M. & S. 377, it was held that a plea of usury to an action of debt on bond, must particularly set forth the *corrupt contract* and the usurious interest; and a plea not stating these was held bad on special demurrer. See also to the same effect, *Tate vs. Welling*, 3 T. R. 538; *Ferral vs. Shaen*, 1 Saund. R. 295; *Mansfield vs. Trears*, Cowp. 671; *Nichols vs. Lee*, 3 Anst. 940. The same doctrine seems to have been generally followed on this side of the Atlantic. Thus in *Childers vs. Deane*, 4 Rand. 406, it was held that "to constitute usury there must be an *intention* to take more than legal interest." So in *Smith vs. Beach*, 3 Day, 268, the court say: "There can be no usury where either of the parties remains ignorant of the usurious consideration. Where more than lawful interest is reserved with the knowledge of the lender, but without the knowledge of the borrower, the transaction is not usurious."

In Pennsylvania, however, the views held at different times upon

this question appear to have been conflicting. In *Lamb vs. Lindsay*, 4 W. & S. 453, Kennedy, J. dissenting, says: "To constitute usury so as to subject the party to the penalty of the act, it is sufficiently evident without any argument to prove it, that there must be an usurious contract at the time of the loan, and an usurious taking in pursuance of it, of money or money's worth." And he cites *Scott vs. Brest*, 2 T. R. 241; 1 Buls. 20; 1 Saund. R. 295, a. note 1.

On the other hand, Gibson, C. J., in *Kirkpatrick vs. Houston*, 4 W. & S. 115, says: "It is the corruption of the taking and not the corruption of the contract which constitutes the offence to which the penalty is annexed; in which respect there is no essential difference between the British statute and our own."

The rule thus laid down by chief justice Gibson is stated in the late case of *Craig vs. Pleiss*, 2 Casey, 272, although it is expressly put upon the distinction between the English and the Pennsylvania statutes of usury, which Judge Gibson denies. In this case, reversing the judgment of the court at N. P., it was held under our statute of 2d March, 1723, that the offence of usury does not consist in the making of a corrupt bargain for more than the legal rate of interest, but for *taking* it "on *any* bond or contract." "The imagined necessity," says Woodward, J. "of a corrupt bargain to complete the offence of usury, favored as it no doubt has been by loose expressions of judges, is wholly without foundation in our statute." How far this case will be held to be law remains to be seen. The point in question, it would seem, did not strictly arise for adjudication, the reserved point disclosing clearly a corrupt contract within the meaning of the English statutes.

Considerable discussion has arisen both in England and this country as to the objects intended to be effected by the laws against usury. The increasingly liberal tone of public sentiment, as well as the course of modern decisions, would seem to construe their enactment as in aid of the indiscretion or inexperience of individuals, rather than as in punishment of a public offence. See a note on this subject by the late H. B. Wallace, in 2 Smith's Leading Cases, 4 Am. ed. 394, with the authorities there cited. See also *Thomas*

vs. *Shoemaker*, 6 W. & S. 183, where Judge Kennedy says: "That money obtained by oppression and by taking advantage of the distresses of others in violation of laws made for their protection, may be recovered back in an action for money had and received, seems to be well settled. And according to that principle it has been held that such action will lie to recover back the excess of interest taken from the plaintiff on an usurious loan to him." It has been uniformly held in Pennsylvania that a contract infected with usury is not void, but that the plaintiff may recover the just principal and lawful interest. *Wycoff vs. Longhead*, 2 Dall. 92; *S. P. Turner vs. Calvert*, 12 S. & R. 46; *Vantine vs. Wood*, 1 Harris, 270. And C. J. Gibson, in a late case, following the rule laid down in *Oyster vs. Longnecker*, 4 Harris, 269, uses the following language: "Formerly a retention or receipt of anything in the shape of interest on an usurious contract was a taking within the statute. But it has been settled both here and in England that until the lender has received more than principal and interest (bonus included) for the sum actually advanced, the offence is not consummated." *Brestler vs. Mehaffie*, 7 Har. 117.

Whether creditors can take advantage of usury in the contracts of their debtors, is a question of considerable practical importance which has never, it appears, been judicially determined in Pennsylvania. Perhaps the weight of authority in England and this country is against such a proposition. But if the object of the usury laws be, as it undoubtedly is, the punishment of fraud in the one party and the protection from fraud in the other, we cannot see what legal principle, based either on public morals or private interests, forbids the application of such laws to all other parties except those immediately concerned in interest. We know of no essential ingredient in the plea of usury, which should take it out of the equitable rule that the creditor is entitled to stand in the shoes of his debtor. The operation of that rule is perhaps nowhere more forcibly seen than in the case of the execution of powers. "Where a man has a general power of appointing a fund, and he exercises the power in favor of a volunteer, equity will, in exclusion of the appointee, seize upon the fund as assets for the payment of the

debts of the person executing the power." Sugden on Powers, vol. 2, p. 173. So also, if there be a defective execution, or an attempt at execution of a mere power, equity will interpose in favor of creditors. 1 Story Eq. Jur. 169. That equity will not relieve against the *non-execution* of a power, is put upon the plain principle of personal confidence in the donee of the power, a principle which manifestly does not obtain in the case under consideration. Even this restriction of the privileges of creditors is censured by very high authority. See 1 Fonb. Eq., ch. 4, sec. 25.

But decisions are not wanting which tend to deny the doctrine that usury is a personal privilege, and to let in the creditor to repudiate the usurious excess, or where the statute makes it void, to annul the contract altogether. Thus in *Gray vs. Brown*, 22 Ala. R. 273, the court say: "We do not understand this principle that usury is a personal privilege intended only for the benefit of the borrower, to assert that the principal debtor alone can avail himself of the usury, for if this were the law, the surety would often be bound beyond his principal. Such, however, is not the law. The rule is, that when the party who makes the corrupt or usurious contract, sues upon such contract, the security can avail himself of any valid defence which his principal might set up, and an accommodation endorser may have the same relief."

And in an earlier case in the same court it was said that, "were it an open question, we should think as to the unlawful per cent. the mortgage would be without consideration, and that the actual amount borrowed with legal interest only could be retained by the mortgagees against the plaintiff in execution." *Harbinson vs. Harrell*, 19 Ala. R. 760.

In *Wells vs. Chapman*, 13 Barb. 563, the exceptions to the rule that usury is a personal privilege with the borrower, were stated to be cases of assignees in bankruptcy, and voluntary trustees for the payment of creditors.

In *Dix vs. Van Wyck*, 2 Hill, 522, the court held that "a deed or contract can be avoided for usury by the party who made it or some one standing in legal privity with him, and not by a mere stranger to the transaction; the executor or the heir may set up

the usury. So also one who is privy in estate, as the grantee of him who made the usurious conveyance. *A creditor who has obtained a judgment and execution cannot be regarded as a mere stranger*, and he may try the title of any one who sets up a prior lien or incumbrance affected by usury."

The case, however, which goes further than the rest, and is in fact decisive of the creditor's right, is that of *Lee vs. Fellowes*, 10 B. Mon. 118. In this case it was decided that "where the borrower has paid usurious interest, his creditor cannot, without his consent, sue for and recover of the usurer the amount of the usury so paid. But where the usury has not been paid, and where the matter in contest between creditors is what sum each may lawfully and equitably assert against the debtor whose means are insufficient to pay all his debts, we apprehend that the rule is and ought to be different. The sum legally due to a creditor is all that in good conscience he ought to be permitted to assert to the prejudice of the claims of other bona fide creditors. It does not at all affect the usurer's demand against his debtor as between themselves. If the latter does not choose to rely on the usury, or if he desires to pay it, be it so. But as the taking of usury is expressly discountenanced by law, we only say that the usurer and his debtor shall not be permitted to increase the demands of the one against the other by the addition of illegal interest, to the prejudice of other creditors."

And as an instance of the tendency of legislation on this subject, it may be stated that in Tennessee, the act of 1844, c. 182, authorizes suits in equity to recover usurious interest for the benefit of creditors.

Some modification in the operation of the usury laws has been effected by the recognition of the principles of building associations. In *Silver et al. vs. Barnes*, 6 Bing. N. C. 180, where loans from the stock fund were made by a mutual benefit society to those of its members offering the highest premium in addition to legal interest, Tindal, C. J. decided, that the contract was not usurious; that the question was whether the transaction was a loan of money or a dealing with the partnership fund. If it was a loan it was usurious. But in this case the court thought it was a dealing with the partner-

ship fund, in which the member bringing the suit had an interest in common with the other members of the society, and that it was not a loan. And he cites a decision of Chief Baron Alexander, in 1828, where an advance from a similar society to one of its members had been held a partnership transaction and not a loan.

This distinction between a loan and an advance of the partnership stock was also taken in *Seagrave vs. Pope*, 15 Eng. L. & E. R. 477. And in *Doe d. Morrison vs. Glover*, 15 Q. B. 103, where the funds of a building society were put up for sale to the highest bidder, who received shares at the rate of his bidding, upon which interest was payable, it was held that its practices did not deprive the society of the protection against the usury laws afforded by the statute 6 and 7 W. 4, c. 32, sec. 2: and that whether the regulations of such a society were a mere color for usury would be a question for a jury.

In Pennsylvania, however, in the case of *Bechtold vs. Brehm*, 2 Casey, 269, a building association had taken the bond of one of its members for the amount of a loan made to him by the association, with premium and legal interest. In a suit upon the bond, the Supreme Court, by Lowrie, J., reversing the decision of the District Court, held that the legitimate purpose of the bond was to enforce the contributions of the defendant as a member. That the association, by depriving him of his membership, had elected to treat the transaction as a loan; that as a loan it was clearly usurious; and that the act of 8th May, 1855, validated such a transaction only so far as it was used to enforce the payment of the contributions of members until the time for distribution of the society's effects shall arrive.

The act of 8th May, 1855, here referred to, is in these words: "That in investments by building associations in loans to members thereof, the premiums given for preference or priority of loan, shall not be deemed usurious." P. L., p. 519.¹

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¹ The reader will find an interesting discussion of the provisions of the New York statute in Hunt's Merchant's Magazine, for September 1857, p. 312.

RECENT AMERICAN DECISIONS.

Superior Court of Suffolk County, Massachusetts.

NATIONAL BANK vs. ELIOT BANK.

1. Where a check in the usual form, payable to bearer, is drawn by B. on the E. Bank, and passes into the hands and ownership of the N. Bank, the latter bank, the holder, cannot maintain an action in its own name against the former bank, the drawee, the check never having been accepted by the drawee, but its payment refused. Per HUNTINGTON, J.; ABBOTT, J., dissenting.
2. But where the third party, seeking to enforce the contract, is particularly designated in the contract, he may maintain an action in his own name for a breach of the undertaking.
3. The contract between a bank and its customer in deposits is in the nature of a loan, and the relation that of debtor and creditor.
4. A check, in order to avail the holder, must be presented, accepted, and charged.

This action was brought by the plaintiff bank as the bearer and owner of a certain check, drawn by Bacon, Price & Co., on the defendant bank, a copy of which is as follows :

“ELIOT BANK, *Boston*, Jan. 22, 1856.

“Pay to 348, or bearer, fourteen hundred dollars.

“BACON, PRICE & CO.”

“To the Cashier.

It appeared in evidence that Bacon, Price & Co. were depositors at the Eliot bank, and that said bank had been in the habit of receiving and paying the checks of that firm for some time previous to the date of this suit; that the said check was presented for payment on the day of its date, and that the defendant bank then had the sum of \$2,009.67 to the credit of Bacon, Price & Co. in their deposit account, but refused to pay said check. It also appeared that at the time of the presentment of said check the Eliot bank had certain promissory notes, signed by Whittier & Warren, who had failed, and endorsed by Bacon, Price & Co., not then due, and for a greater amount than the sum to the credit of Bacon, Price & Co. in their deposit account.

The case was taken from the jury and argued before the full court, and the opinion of the court delivered by

HUNTINGTON, J.—In this case the plaintiff corporation was the holder of a check, drawn in common form by the defendant corporation, and seasonably presented at the counter of the Eliot bank for payment. Payment and acceptance were refused, and the plaintiff, as holder, seeks to maintain this action for such refusal. Whether the drawers would have a remedy in their own names is not the point in dispute. Can the payee or holder of the check intervene, and in his own name hold the bank upon which it is drawn? As this question lies at the foundation of the suit, it is not now necessary to take notice of the other facts found or agreed between the parties—demand, protest, the state of accounts, and dealings by the respective banks.

The authorities, so far as they speak of the precise nature of the contract between the bank and its customer in common deposits, treat it as in the nature of a loan, and the relation arising as that of debtor and creditor, not a deposit merely. The bank opens an account of debit and credit. It employs the money for its own use; it becomes part of its general assets. No third party is named or known, and the bank is liable to answer the checks of the customer to that amount. *Carr vs. Carr*, 1 Merivale, 541; *Devaynes vs. Noble*, *Ibid.*, 568; *Commercial Bank of Albany vs. Hughes*, 17 Wend. 100; *Sims vs. Bond*, 2 Nev. and Man. 608. In this last case A, in his own name, deposited with C., his banker, funds which were the proceeds of a partnership sale of partnership effects, which belonged to A, together with one B. The question was, whether in a suit against the banker for the money so deposited by A, B could be joined with A, and it was held that he could not, because, say the court, there was no privity of contract with the partners A and B, and, it is added, “sums which are paid to the credit of a customer with a banker, though usually called deposits, are in truth loans by the customer to the banker, and plaintiffs who seek to recover the balance of such an account must prove that the loans were made by them.” It is obvious that the plaintiffs, in the case at bar, could not recover on this ground.

In Byles on Bills, p. 16, note, the author seems to deny that the holder of an unpaid check has an equitable claim on the drawee, even in bankruptcy, so as to prove under the fiat as assignee of a chose in action, and he cites a case where commissioners in bankruptcy, after taking time to consider, disallowed the claims of several holders of checks on the bankrupts, who claimed to prove as equitable assignees of choses in action.

The contract between the bank and the customer rests on an implied obligation, one and entire, between the parties only, and not for the benefit of any third person. It is well settled that an order or draft for a part only of the debt or liability of the drawee does not, against his consent, amount to an assignment of any portion of the debt or liability, and does not authorize the institution of a suit in the name of the assignee, for the whole or any part, because a debtor is not to have his responsibilities so far varied as to subject him to distinct demands on the part of several persons, when his contract was one and entire. *Gibson vs. Cook*, 20 Pick. 15.

In *Bullard vs. Randall*, 1 Gray, 606, the judgment of the court proceeded on the ground that a check must not only be presented, but accepted by the bank and charged, in order to avail the holder, and that a verbal assent of the cashier, away from the counter of the bank, cannot avail him. If the bank, therefore, as in the case at bar, refuse to accept and pay, it seems that the holder has nothing of which he can "avail" himself as against the bank, and can maintain no action in his own name. In *Taylor vs. Wilson*, 11 Met. 52, it was held that if a creditor, in payment of a debt, take a check upon a bank, and the bank fail, or the check be dishonored, the check is mere evidence of a debt due from the drawer, not a payment, and the creditor's remedies against the drawer remain entire, if he is not guilty of laches.

The usage of banks in giving what are known as certificates of deposit, where third persons are intended to have the benefit of money thus passed to the banks, in which the money is expressly stated to be payable to the order of such third person on the return of the certificate, throws some light on the nature of the contract in cases of common deposits, where no third party is recognized in terms. It is not the custom to present checks for mere acceptance,

or to give notice, or for the holder to sue the bank upon a refusal to accept. If an action can be sustained by the holder of a check against the bank, under the circumstances of this case, it is singular that, so far as our search has reached, no precedent of the sort can be found in the books.

On the other hand, there are dicta of judges, and of text-books, and analogies of the law, to the effect that such an action cannot be sustained.

In *Bellamy vs. Majoribanks*, 8 E. L. and Eq. Rep. 517, where the question was as to the effect of "crossing checks," the Attorney General, Cockburn, says, in the course of his argument, that "the banker owes no duty to the holder, and is liable to no action at his suit, if the check is not honored." This was not controverted by the opposing counsel. But what is of more weight, Baron Parke, in his opinion in the same case, treats it as a familiar well-settled principle, and says:—"The lawful holder of the check is of necessity entitled to receive payment of it. He could not sue the drawee unless the drawee had accepted the check, a practice not usual, but he could sue the drawer for non-payment, if he was the holder for value."

When, therefore, in *Marzetti vs. Williams*, 1 B. & Ad. 415, it was held that a banker was liable in an action of tort or contract to the customer for refusing to pay a check when in funds, though no actual damage was sustained, on the ground that the contract was to pay all drafts presented in a reasonable time after receiving the money, it is clear that the court did not mean to decide that the banker was also liable to the holder of the check, or under a contract with him.

The consideration that he was not liable to the holder would seem to be a good reason why he should be liable over to the drawer in tort or contract.

¶ In *Chapman vs. White*, 2 Selden, 412, it is said the drawee owes no duty to the holder of a check until after it is accepted. The right of the depositor is a chose in action. The draft or check of the depositor does not transfer the debt, or a lien upon it, to a third

person without the assent of the depository, and *Dykers vs. Leather Man. New Bank*, 11 Paige, 616, is cited.

In Chitty on Bills, under the head of "Acceptances," p. 280, 281, it is said a banker is liable to an action by the customer if he should refuse, having sufficient money in hand to honor the check of his customer, but that, in case of refusal, the holder has not any remedy at law against the drawee or banker on the funds in his hand. The law, however, says the author, is otherwise in France. He adds, as to bills of exchange, that if the drawee, by course of business, has impliedly engaged to accept, and afterwards refuses to perform, then he is liable to the drawer, but not to any other party. Even this has not been adopted as a rule of law in this country. To introduce it here now, as to checks, would be introducing a novel principle, multiplying the distinctions and rules of mercantile law. There is good authority for holding that an express precedent promise to accept a draft, to be afterwards drawn, is a chose in action not negotiable or assignable so as to enable the assignee to maintain an action in his own name.

Chancellor Kent says, it seems to be a little difficult to understand how the endorsee of a bill, subsequently drawn, can charge the drawee with acceptance by virtue of such a preceding promise, which is not of itself assignable, and is strictly no part of the negotiable contract. *McEvers vs. Mason*, 10 Johns. R. 215; *Ontario Bank vs. Worthington*, 12 Wend. 598. This reasoning applies with quite as much force to a check "subsequently drawn" as to an ordinary bill of exchange. That such a known legal distinction exists between checks and bills of exchange would be a difficult proposition to support upon any decided cases.

A further inquiry arises whether the contract between the customer and the banker can be brought within the principle, now well established, and which has been applied to a certain class of cases to be found in the books, viz: that if A receives money of B, to the use of C, though there is no communication between A and C, and no privity other than what arises from the duty of paying, an action will lie in behalf of C against A. In other words, that when one person, for a valuable consideration, engages with another by simple

contract to do some act for the benefit of a third, the latter, who would enjoy the benefit of the act, may maintain an action for the breach of such engagement.

This principle has been applied in this State in *Hall vs. Marston*, 17 Mass. 575; in *Arnold vs. Lyman*, *Ibid.* 400; and in *Carnegie vs. Morrison*, 2 Met. 402. In these cases, however, and in the cases cited by the court in giving the opinion in 2 Metcalf, it will be found that the third party, seeking to enforce the contract, is particularly designated and named in the contract, that the person who is to receive the benefit is specifically pointed out.

In *Hall vs. Marston* the defendant was specially directed, when he received the remittance, to pay over a certain sum named to the plaintiff, and the court held that he was to be charged as an agent, who had accepted the agency, and that he could not follow his directions as to receiving the money and disobey them as to the application of it.

In *Arnold vs. Lyman*, the defendant, Lyman, took an assignment of the notes and goods of one Hutchins, and in consideration promised him to pay certain liabilities due to himself, and also a note of the plaintiff, who was mentioned by name. The court held that the plaintiff might sue the assignee, defendant, on the ground that the promise might be considered as legally made to the several creditors named in the assignment, because the promise was to pay certain particular debts, and that, therefore, it might be treated as a promise to the creditors, and that, bringing the action by the plaintiff, to whom a note was due, was an assent to the promise, it being for his interest that it was made. But in the case of a bank deposit or loan, like that at bar, no particular debts are named, no particular creditors, and there is no appropriation of the moneys at the time of the deposit.

In *Carnegie vs. Morrison*, the third party, plaintiff, was named in the letter of credit written by the defendants, through which the defendant was held liable as on a contract made with the plaintiff, though the letter was merely addressed to a person who owed the plaintiffs, and who procured the letter of credit for their benefit.

The contract between the bank and its customer in deposits does

not, therefore, seem to come within the letter or spirit of the principle and reasoning recognized in these cases of money received by A from B for the use of C, or for the benefit of a third person. To apply it to a loan or deposit would seem to be forcing it into service for which it was never designed, and for which there is no precedent. Judgment must therefore be for defendant.

ABBOTT, J., (dissenting.)—After the best consideration that I have been able to give to the question involved in this case, I have been unable to agree with the other members of the court in the conclusion at which they have arrived. Although, unfortunately, there are no adjudicated cases in England or this country directly in point, I think a careful consideration of the principles applicable, and of decisions in analogous cases, will enable us to come to a satisfactory result, and one in accordance with the universal practice and understanding of the commercial and business community, and every member of it who may have occasion to give or take a bank check. It is certainly important to all that the respective rights and obligations of the holder and drawer of a banker's check should be settled and defined, so that upon a matter of such constant and often recurring importance as the law governing that class of securities, there should be no doubt. The simple question presented in this case is, whether a bank or banker with whom a customer has deposited cash, to be drawn out upon his checks, is liable in a suit by the holder of a check who has presented it at a proper time and been refused payment, although the drawee is in funds deposited for the purpose of being appropriated for such payments.

I think the law to be, that if a holder of a bank check presents it at a proper time and demands payment, the bank possessing funds of the drawer, deposited for the purpose of meeting checks to be drawn by him, and payment is refused, he can recover the amount of it in an action against the bank. What is the contract between the depositor and the bank? Beyond all question simply this: In consideration that the depositor will let his cash remain with the bank, either with or without interest, as shall be agreed upon, until he wants it, they agree to pay it out in such sums as he shall draw checks for, to any persons who shall present such checks. This is

the contract between the bank and its depositor in the ordinary course of business, as it is understood by the whole commercial community, and as it is defined by the law. The money is deposited for the convenience and safety of the customer, and the consideration to the bank for keeping and paying it out on checks is that they have the use of it while thus deposited. The drawing of the check is in and of itself an appropriation of its amount out of the funds in the banker's hands; and, after notice of such appropriation, neither the drawee nor the bank can withhold the funds so appropriated. *In re Brown*, 2 Story, 516; Story on Pr. Notes, § 489; *Bæhm vs. Stirling*, 7 Tenn. R. 429; 3 Kent's Com. 104, note c.

It is of no consequence, and does not alter the relation between the parties that cash so taken is not held in specie, as a special deposit to be kept and returned in the same form as deposited, or that it amounts merely to a credit to the customer on the part of a bank, and goes into their general assets. The only important inquiry is upon what contract is the money taken, and does the bank, by taking it, assume and agree to pay on demand the checks of the customer to the holders who should present them? That such is the contract of the bank cannot now be disputed. Indeed, upon the strength of it the courts have very properly held that where the banker refuses to pay a check upon presentment, by mistake, supposing at the time he was not in funds, when in fact he was, the drawee could maintain an action of tort or contract, and recover nominal damages, though he could prove no actual injury. *Marzetti vs. Williams*, 1 B. & Ad. 415; Chitty on Bills, 280, 281; *Harker vs. Anderson*, 21 Wend. 379; *Little vs. The Phoenix Bank*, 2 Hill, 431; *Whitacre vs. Bank of England*, 1 Crompt., Mees. & Ros. 741.

There is also a principle of law equally well settled by a series of authorities, as is the contract between the banker and his customer, which is applicable to the case in hand, and which, applied to that contract, seems to me decisive. It is this:—Whenever one person puts money into the hands of another to be paid to a third, or whenever one, for a good consideration, contracts with another that he will do some act for the benefit of a third person, the third person,

in such case, can maintain an action in his own name against the person so receiving the money or making the provision for his benefit, although there was no privity of contract between them, being in fact perfect strangers. This has been settled in a great variety of cases, both in this State and elsewhere, as where A paid B money, with directions to pay it to C, or where one, owing debts to various persons, assigned property to another, taking his written agreement to pay certain creditors of the assignor. 22 Am. Jur. 17 ; 2 Greenl. Ev. 109 ; *Arnold vs. Lyman*, 17 Mass. 404 ; *Hall vs. Marston*, 17, Mass. 575 ; *Felton vs. Dickinson*, 10 Mass. 287 ; *Carnegie vs. Morrison*, 2 Met. 402 ; *Fulton vs. Poole*, T. Raymond, 802.

The objection that has been urged to a recovery by the plaintiffs, that where one owes another, and the creditor undertakes to assign a part of the debt, the debtor is not bound in law or equity to take notice of such assignment, has no weight, and is not even applicable to the case at bar. The reason given for the rule in that case is this, the debt being entire, the debtor cannot, against his consent, be made accountable to several debtors instead of one ; he can well rely upon his contract, and say I agreed to pay one, not many. This reason, and the only one given for it, does not apply in the case of the banker, because he has contracted with his customer that he would pay the funds in his hands to as many different persons, and in as many different parts as the customer should order by his written checks. In the one case making the debtor liable to more than one would be directly in conflict with his contract, and in the other directly in accordance with its very terms.

We have then the contract of the banker with his customer who deposits money with him, that he will pay it upon the written checks of the depositor to the persons who shall present them ; and also the well established principle of law, that whenever one promises another that he will pay money, or do an act for the benefit of a third person, the third person may sue in his own name, although no consideration moved from him, and no contract was made between him and the person sued. Apply this clearly defined and authoritative rule to the contract between the banker and his customer, and will it not inure to the benefit of the holder of a check drawn by the depositor

on the banker? How can such a conclusion be escaped? The banker promises the depositor to pay the person who may hold and present a check drawn by him, and on the strength of that promise the holder takes the check and presents it; why should he not maintain his action against the banker on the ground that the latter has made a contract for his benefit, indeed to pay him money directly? It would be admitted that the case would be within the strict letter, as well as the spirit of the rule, if the persons in whose favor checks were to be drawn were named at the time of the deposit. Can the fact that the *cestui que use*, viz. the check holder, is not named, make any difference in principle? There are a great variety of contracts that are legal, and can be enforced by those who had no interest in them at their inception, as in the familiar case of a promise to pay a reward to any one who should restore lost or stolen property; or the still more familiar one of a promise to pay money to order or bearer, in either of which cases the contract might be enforced by an action in the name of one not *in esse* at the time of its inception.

But upon this point we are not without the aid of express authority, and that of the highest character. In the case of *Weston vs. Barker*, 12 Johns. R. 276, a third person had assigned to the defendant certain demands, which were to be collected by him, and appropriated first to the payment of certain specific debts of the assignor, and the balance held subject to his order. This assignment was accepted by the defendant, and after he had collected the claims the assignor ordered the defendant to account for the balance with the plaintiff, which the defendant refused to do. The court held, that although at the time the assignment was accepted the plaintiff was not named, and although it was an agreement on the defendant's part to pay to any person the assignor might order, still an action could be maintained against the defendant in the name of a payee of an order subsequently drawn. This case seems to me to be decisive of the objection that at the time of the banker's contract with his customer the persons to whom the money is to be paid are not named. The contract is to pay to the customer's order, and when the order or check is drawn the person to whom payment is to be made becomes

fixed and ascertained. To the same effect is the case of *Fenner vs. Meares*, 2 Wm. Bl. 1260. And although the authority of the case has been somewhat questioned subsequently by Lords Kenyon and Ellenborough, it was not overruled, and I think the opinion given by Lord Chief Justice De Grey, and acquiesced in by the court, addresses itself to the judgment as being both too well considered and too well founded upon principle to be shaken by the hasty dicta of the learned judges before mentioned. Indeed, if these two cases are to be considered as authority, they would seem to go far towards settling the main question in this case.

It is true, undoubtedly, that there is no precedent exactly in point to sustain the position here taken, but it is equally true that there is none directly in point against it. The boast of the common law is, that it is not necessary to provide in terms for every possible case that can arise out of the ever-varying and shifting, and almost innumerable relations subsisting between men engaged in commerce and business in a highly civilized community; but that it provides a system, a collection of general principles applicable to all cases, by which the rights and duties of each and all, growing out of such relations, may be established and defined. To refuse to apply a well established and general principle to a new case that may arise, because there is no precedent for it, would be contrary to the policy of the law, and directly in conflict with the genius of the whole system.

The result to which I have come is, that a holder of a check, who presents it to the banker upon whom it is drawn, who is in funds on account of the drawee, and is refused payment, can maintain his action as well against the banker as the drawee. Such a rule would work no practical difficulty. On the contrary, no presentment for acceptance being necessary, and bankers being obliged to pay in the order in which checks are presented, it would add to the diligence of holders in collecting them, and increase confidence in a class of securities generally used and highly necessary in a business and commercial community.

*In the Supreme Court of Alabama, June Term, 1856.*FRANKLIN vs. THE STATE.¹

1. *Violent character of deceased, when admissible evidence.*—The character of the deceased as a violent, turbulent, blood-thirsty man, when it qualifies, explains, and gives point and meaning to his conduct, and tends to produce in the mind of the slayer a reasonable belief of imminent danger, is admissible evidence for the defendant; and there are cases, also, in which it may be looked to, in determining the amount of provocation, and thus fixing the degree of the homicide; but the evidence in this case does not justify its admission on either of these grounds.
2. *Character how proved.*—The violent character of the deceased cannot be established by proof of isolated facts. •
3. *Misconduct of jury.*—The separation of the jury, for a short time, while considering of their verdict, is a matter to be considered by the court on motion for a new trial, but is not a proper ground for a motion in arrest of judgment.
4. *Refusal of new trial not revisable.*—The action of the primary court on a motion for a new trial is not revisable in the appellate court.

From the Circuit Court of Pike.

Tried before the Hon. E. W. PETTUS.

Indictment against Philemon J. Franklin for the murder of his brother, Christopher Franklin, by shooting him with a gun. The only evidence in relation to the killing was the testimony of a young man, then about sixteen years of age, who was an eye-witness of it, and whose testimony, in substance, is stated in the opinion of the court. On the part of the prisoner, evidence of his peaceable character was introduced; and he then offered to prove, "that the deceased, some time before the killing, attempted to shoot a woman in Coffee county, without any cause." This evidence, on objection by the State, was excluded, and the prisoner excepted. The prisoner then offered to prove, "that the general character of the deceased was that of a turbulent and dangerous man;" but this evidence also was excluded by the court, and the prisoner excepted.

After conviction, the prisoner moved to set aside the verdict,

¹ We are indebted to the learned State Reporter, John W. Shepherd, Esq., for the early sheets of 29 Ala., where this and the next succeeding case will be found reported.

"because the jury were allowed to separate while the trial of said cause was in progress," and submitted an affidavit of the fact on which the motion was predicated; but the court overruled the motion, and the defendant excepted.

E. C. Bullock, for the prisoner.

1. While the bad character of the deceased, *per se*, does not in the slightest degree affect the character of the homicide, it yet becomes a legitimate and important subject of inquiry, where the circumstances make the precise grade of the crime doubtful, and where the ferocious temper of the deceased might furnish a key to the whole transaction. The true test, as recognized by the cases of *Quesenberry and Pritchett*, 3 Stew. & P. 308; 22 Ala. 40, seems to be this: If the evidence of the homicide is so complete and satisfactory that, whatever may have been the character of the deceased, it could not have been so connected with the killing as to change the grade of the offence, then the evidence is inadmissible; but, on the other hand, if sufficient doubt hangs over the transaction to make it probable that the character of the deceased may have had some bearing on the character of the offence, then the evidence ought to be admitted. The case at bar, tested by this rule, is pre-eminently one where the evidence should have been allowed to go to the jury. There was but a single competent witness to the homicide, and he a youth of not more than sixteen years. That he did not remember all that occurred, is admitted by himself; and that he leaves some undoubted chasms in the conversation, is sufficiently apparent. That the deceased loaded his gun, after having just fired it off; that he followed defendant to his house, where his own violence was met by words of kindness; that he seized defendant by the hand,—a fact wholly unexplained; and that the fatal shot was fired, apparently without any immediate cause, by one whose whole behavior up to that time had been peaceable,—all these facts make the question of character highly material, and might enable us to find in that character a solution of the mystery which certainly overshadows the whole affair.

2. That the misconduct of the jury was good ground for setting aside the verdict, see *McCann vs. The State*, 9 Sm. & M. 465.

M. A. Baldwin, Attorney General, contra.

1. The character of the deceased can never become a matter of controversy, under an indictment for homicide, except when involved in the *res gestæ*. When a homicide is committed under such circumstances as tend to show that the prisoner acted in self-defence, then the conduct of the person slain, construed with reference to his known character, becomes a part of the transaction; but, when the evidence not only fails to show any conduct on the part of the deceased which could raise the question of self-defence, but affirmatively shows (as it does here) that his situation and position precluded that question, his bad character cannot be received to mitigate the offence. On this point, see the following authorities: Wharton's Criminal Law, 172; *Pritchett vs. The State*, 22 Ala. 42; *Field vs. The State*, 14 Maine, 248; 8 Iredell, 344; 1 Hawks, 210; 9 Yerger, 342.

2. As to the motion in arrest of judgment, see *Brister vs. The State*, 26 Ala. 133.

The opinion of the court was delivered by

WALKER, J.—It has been twice decided in this State, and must now be regarded as law, that the testimony, in prosecutions for murder, may be such as will justify the admission of the bad character of the deceased as evidence for the accused, *Quesenberry vs. The State*, 3 S. & P. 308, *Pritchett vs. The State*, 22 Ala. 39. In *Quesenberry's* case, this court declined to decide in favor of the reception of such evidence, because, the facts not being disclosed upon the record, it could not be perceived that the case presented an aspect justifying it. In *Pritchett's* case, the object of the court seems to have been to limit the admission of the evidence to cases where it may be considered a part of the *res gestæ*. In both cases, it is carefully and properly denied that the bad character of the deceased can, of itself, lessen the criminality of his murder. The rule is laid down in *Oliver's* case, 17 Ala. 599, that "the necessity which exculpates the accused from guilt, need not be actual; that if the circumstances be such as to induce a reasonable belief that

such necessity exists, the law will acquit the slayer of all guilt." It seems to result as a sequence from this principle, that the character of the deceased for turbulence, violence, revengefulness, bloodshed and the like, where it qualifies, explains, and gives meaning and point to the conduct of the deceased, should be proper evidence. Conduct of a man of peaceable character and harmless deportment, might pass by without exciting a reasonable apprehension of impending peril; while, on the other hand, the same conduct, from a man of notoriously opposite character and habits, might reasonably produce a consciousness of the most imminent peril, and a conviction of the necessity of prompt defensive action. Whenever such bad character on the part of the deceased thus illustrates the circumstances attending a homicide, and the circumstances, *so illustrated*, tend to produce a reasonable belief of imminent danger in the mind of the slayer, the character, as mingled with the transaction, is a part of it, and is indispensable to its correct understanding. Such we understand to be, in effect, the decisions in Quesenberry's and Pritchett's cases.

To avoid detriment in the practical application of the rule, it must be understood neither, on the one hand, to excuse the taking of one's life because he is a bad man, nor, on the other, to be limited to those cases where the facts are such as to make it doubtful whether the homicide was committed *se defendendo*. The law cannot apportion the criminality of the homicide to the character of the deceased, and it cannot confine the rule to cases of doubt; because, in such cases, the defendant is entitled to an acquittal, and therefore, to so limit it, would deny to it all practical effect. When the conduct of the deceased, although in itself innocent, is such that, illustrated by his character, its tendency is to excite a reasonable belief of imminent peril, the evidence ought to be admitted, and the question of its effect left to the determination of the jury. It would be for the court to determine, in every case, whether the facts are such as will justify the admission of the evidence, as it is its duty to determine, before receiving in evidence the declarations of third persons, whether they are part of the *res gestæ*.

We are of the opinion, also, that there are cases in which the

character of the deceased might be looked to, in determining the amount of provocation, and thus fixing the degree of the homicide.

We cite below the authorities which we have examined in reference to the questions above decided, some of which will be found to militate against our opinion, and to be less favorable to the accused. But the principles which we have laid down have the fullest sanction of our judgment, because they are consistent with the previous decisions of this court; and are, we think, founded in justice and reason.—Wharton's American Criminal Law, 172; Roscoe's Criminal Evidence, 39; Wharton's 'American Law of Homicide, 249, 229; *State vs. Barfield*, 8 Iredell's Law, 344, dissenting opinion of Battle, J.; *State vs. Thawley*, 4 Harr. (Del.) 563; *Wright vs. The State*, 9 Yerger, 342; *Dyson vs. The State*, 26 Miss. 363.

We now turn to the testimony, for the purpose of inquiring whether the circumstances were such that, under the rule we have laid down, the character of the deceased, "as a turbulent and dangerous man," ought to have been admitted in evidence. The prisoner and deceased were brothers, and worked together in a blacksmith shop. The deceased went to the prisoner's house, with a loaded gun, late in the evening, and near the door of the prisoner's house, used reproachful and angry words for some time, but did not use any language of menace, or indicating an intention, either present or prospective, to perpetrate violence upon the prisoner. The deceased afterwards went into the house, where the prisoner was at the time lying upon a bed. Immediately afterwards, the prisoner said to the deceased, "you have come here with your arms, and I have nothing to defend myself." "The deceased then placed his gun on the bed on which the prisoner was lying, and turned and walked off about ten feet to a table, and turned and sat down on the table, with his face to the prisoner. As the deceased turned to walk off from the bed, the prisoner seized the gun, cocked and presented it; and at the instant when the deceased sat down on the table, the gun fired, and the load entered the breast of the deceased, who fell forward, with his head towards the bed, and his feet three or four feet from the table, and expired in about half an hour."

The evidence conduced to show that the deceased carried the gun for the purpose of shooting birds, and it does not appear that he had any other arms. The deceased, upon the prisoner's suggestion of his defenceless condition, not only disarmed himself, but placed his gun in the power of the prisoner, and then walked away, with his back to his slayer; and at the instant when he was seating himself, he received the contents of his own gun, from the hand of him in whose power he appears to have placed it,—a token of trust, and a sign of his own peaceful intention. There was not a word spoken, not an act done, which, illustrated by the character of the deceased, and construed by the prisoner in the light of that character, could tend to produce a reasonable belief of imminent peril. Nor was there any act or word from the prisoner, which, explained by his character, could aggravate his conduct into such a provocation as mitigate the offence to a lower degree.

The fact that the deceased had attempted to shoot a woman, was not admissible in evidence. If it had been a case in which the character of the deceased would have been competent evidence, it would not have been permissible to make out the bad character by isolated facts.—*Nugent vs. The State*, 18 Ala. 521.

The separation of the jury for a short time, while they were considering of their verdict, is a matter to be considered by the court which tries the case, upon motion for a new trial, and is not a proper ground for motion in arrest of judgment; and the decision of the court below, on a question of new trial, is not revisable in this court.—*Brister vs. The State*, 26 Ala. 107.

The judgment of the court below must be affirmed, and its sentence executed.

NOTE.—On the trial of an indictment for homicide, evidence to prove that the deceased was well known and understood generally by the accused and others to be a quarrelsome, riotous and savage man, is inadmissible. *State vs. Field*, 14 Maine Rep. 248; *Com. vs. York*, 9 Metc. 110; *State vs. Hawley*, 4 Harring, 562; *State vs. Jackson*, 17 Miss. 344; *Com. vs. Hillyard*, 2 Gray, 294; *State vs. Brien*, 10 La. R. 453.

In a late case in Massachusetts this point was thus summarily disposed of: "J. G. Abbott, for the defendant, offered evidence, that the general character and habits of the deceased were those of a quarrelsome, fighting, vindictive and brutal man, o

great strength, as a circumstance tending to show the nature and provocation under which the defendant acted, and that he had reasonable cause to fear great bodily harm;" and cited *Quesenberry vs. The State*, 8 Steu. & Port. 308; *The State vs. Tackett*, 1 Hawks, 210; *Oliver vs. The State*, 17 Alaba. 599; *Com. vs. Seibert*; Wharton on Homicide, 227. J. H. Clifford, Attorney General, objected to the admissibility of the evidence, and cited *Com. vs. York*, 7 Law Reporter, 507, 509.

By the court:—The evidence is inadmissible. If such evidence were admitted on behalf of the prisoner, it would be competent for the Commonwealth to show that the deceased was of a mild and peaceable character. Such evidence is too remote and uncertain to have any legitimate bearing on the question at issue. The provocation under which the defendant acted must be judged of by the *res gestæ*, and the evidence must be confined to the facts and circumstances attending the assault by the deceased upon the defendant, *Com. vs. Hillyard*, 2 Gray's R. 294.

In the eye of the law, to murder the vilest and most abject of the human race, is as great a crime as to murder its greatest benefactor. In one or two cases, however, while the law, as above laid down, was distinctly recognized, it has been said that when the killing has been under such circumstances as to create a doubt as to the character of the offence committed, the general character of the deceased may sometimes be drawn into evidence, but the rule undoubtedly is that the character of the deceased can never be made a matter of controversy except when involved in the *res gestæ*, for it would be a barbarous thing to allow A. to give as a reason for his killing B., that B's disposition was savage and riotous. The defendant may prove that he was acting in self defence, or he may exhibit whatever provocations were given to him by the deceased, or he may put in evidence threats and expressions of hostile feeling from the deceased to himself, but he cannot set up general reputation as a defence. Thus, on an indictment against an overseer for the murder of his employer, it is not competent for the prisoner to offer evidence of the general temper and deportment of the deceased towards his overseers and tenants. When, however, it is shown that the defendant was under a reasonable fear of his life from the deceased, the deceased's temper, in connection with previous threats, &c., is sufficiently part of the *res gestæ* to go in evidence as explanatory of the state of defence in which the defendant placed himself; and it certainly is admissible to show that the deceased was possessed of preponderating strength, and that his character was so far desperate as to necessitate the extremest precautions on the part of a person attacked by him. The question then is, not whether A. was justified in killing B., because B. was savage and riotous, but whether A., being attacked, he was justified in concluding that killing B. was his only chance of escaping with his own life. Wharton's Criminal Law, § 641, 4th ed., 1857.—*Eds Am. Law. Reg.*

In the Supreme Court of Alabama, June Term, 1856.

STEIN vs. BURDEN.

1. *Rights of riparian proprietor to use of water of running stream.*—A riparian proprietor has the right to use the water which flows by or through his lands, for all ordinary purposes, and for the gratification of natural wants, even though the entire stream is thereby consumed; and also the right to its extraordinary or artificial use, provided it is not thereby forced back on the lands of the proprietor above him, is not unreasonably and injuriously precipitated on the lands of the proprietor below, and is restored without material diminution, before it leaves his lands, to its accustomed channel.
2. *His duty to restore water diverted for artificial purposes.*—If a riparian proprietor diverts the water of a running stream for artificial purposes, in quantities sufficient to affect injuriously the rights of the proprietor below him, and does not restore it to its natural channel, without material diminution, before it reaches the lands of that proprietor, he is liable in damages for the injury; and that the means provided by him for its restoration are rendered inefficient for that purpose, after the water has left his land, by the act or interference of a third person, though it might mitigate the damages, is no excuse for the failure, since the right to divert it is only conditional, and ceases when the water cannot be restored. (Rice, C. J., *dissenting*.)
3. *Substance of issue and variance.*—When the complaint alleges that the defendant wrongfully diverted the water, while the evidence shows that, though the water was originally diverted by him, he provided means for its return to its natural channel above plaintiff's lands, and that its return was prevented by the act of another person after it left defendant's land, there is no material variance between the allegations and proof. (Rice, C. J., *dissenting*.)

Appeal from the City Court of Mobile.

Tried before the Hon. ALEX. MCKINSTRY.

The material facts of this case, as embodied in the opinion of the court, are the following: "This was an action by a riparian proprietor, owning lands on both sides of Three-mile creek, near Mobile, to recover damages for defendant's diversion of water from said creek, at a point above the lands of plaintiff, to the alleged detriment of plaintiff and his mill-interest on said creek. The complaint alleges that, on the 20th November, 1851, and on divers other days and times between that time and the filing of the complaint, 3d

November, 1853, the defendant 'wrongfully and injuriously diverted, and turned out of its natural channel, at a point above the land and premises of plaintiff, a large portion of the water of said creek, so that the same was thereby wholly diverted and turned away from the land and mill of the plaintiff, and prevented from flowing as it had been accustomed, and would otherwise have flowed, through said lands, and by said mill, but for such diversion.'

The bill of exceptions shows, that the defendant had dug a ditch, to convey the water back into the channel of the creek above plaintiff's mill; 'which said ditch would do, but from the fact, that some persons other than the parties to this suit had opened a ditch, to lead the water from said Three-mile creek down to a paper-mill, which last-mentioned ditch unites with the creek at the same point that Stein's ditch does; so that much of the water that runs out of Stein's ditch is carried down the ditch that runs to the paper-mill, and does not return to the creek above Burden's mill.' There was a conflict in the testimony, whether Stein's ditch, or the ditch to the paper-mill, was first dug. Stein did not own the land where the two ditches intersected the creek.

The court was requested by the defendant to charge the jury, 'That if Stein had dug his return ditch, so as to carry off all the surplus water into the creek, and afterwards some other person, without his concurrence, had opened the ditch to the paper-mill on the city property, so as to carry water out of Stein's ditch down to the paper-mill, that Stein was not chargeable with the water so carried down said ditch.' This charge the court gave, with the following qualification: 'That if Stein abstracted the water from the creek, it was his duty to see that it was returned into the creek above plaintiff's mill; and if any other person had opened a ditch, so as to take the water from Stein's ditch down towards the paper-mill, with Stein's knowledge, and if Stein did not, within a reasonable time after such knowledge, provide means of returning the water to the creek, but permitted it still to flow so that the water did not run from his premises back into the creek above Burden's mill,—then Stein would still be liable for not returning the water.' To this qualification the defendant excepted."

R. H. Smith and F. S. Blount, for appellant.

The principal question raised by the record, is, in substance, whether a riparian proprietor, who diverts water for his mill, but returns it to its original stream, so as not to injure the proprietor below him, is responsible for a diversion caused by a third person, who intersects the artificial channel provided for the restoration of the water, just at its mouth, on his own land. This question arises in two aspects: 1. Can a recovery be had on a declaration, which alleges no special damage, but only charges Stein with diverting the water. That it cannot, see the following authorities: *Sedgwick on Damages*, 76, 77; 1 *Chitty's Pleading*, 396; *Fitzsimmons vs. Inglish*, 5 Taunton, 534; *De Forest vs. Leete*, 16 Johns. 122.

2. Under no declaration could Stein be made liable for the diversion of Portier, or required to put an end to the wrong done by a third person; especially as it was not on his land.—Authorities *supra*; also, *Vicars vs. Wilcocks*, 8 East, 1; *Livie vs. Janson*, 12 East, 648; *Flower vs. Adam*, 2 Taunton, 314; *De Vaux vs. Salvador*, 4 Ad. & El. 420; *Burrows vs. Wright*, 1 East, 615; *Olney vs. Fenner*, 2 Rhode Island R. 214; *Armstrong vs. Percy*, 5 Wendell, 538; 2 Greenl. Ev. § 256.

K. B. Sewall, *contra*.

1. The charge requested by the appellant was not law, and even the qualification given was too favorable to him. His obligation to restore the water which he had diverted, before it reached the plaintiff's lands, to its accustomed channel, results from the nature of the property in running water, and the rules which have been universally applied to regulate its use. No riparian proprietor has the right to use the water to the prejudice of other proprietors, above or below him. Though he may use the water while it runs over his lands, he cannot unreasonably detain it, or give it another direction; and he must return it to its ordinary channel when it leaves his estate. To say that another person has interrupted the return, is no excuse for his failure to return the water. The diversion is at his peril who diverts; and if he cannot return the water, after a reasonable use of it, he must not divert it.—3 Kent's Com. 439,

441; Angell on Water-Courses, §§ 5, 90, 94, 95, 97; *Beissell vs. Sholl*, 4 Dallas, 211; *Parker vs. Griswold*, 17 Conn. 288; *Omelvany vs. Jagers*, 2 Hill's (S. C.) R. 634; *Howell vs. McCoy*, 3 Rawle, 256; *Wood vs. Waud*, 3 W., H. & G. (Exch.) 748; *Blanchard vs. Baker*, 8 Greenl. 266; *Embry vs. Owen*, 6 W., H. & G. (Exch.) 367-70; *McAlmont vs. Whitaker*, 3 Rawle, 84; 20 Penn. State R. 89; 5 Vermont, 371; 9 Watts, 119; 2 Denio, 443; 1 Bos. & Pul. 404.

2. Under the complaint, the plaintiff was entitled to recover damages for any diversion of the water of Three-mile creek which the evidence might establish. The evidence corresponded substantially with the averments of the complaint, and entitled the plaintiff to a recovery.—*Shears vs. Wood*, 7 Moore, 345; *Ricketts vs. Salwey*, 2 Barn. & Ald. 360; *Burdick vs. Glasco*, 18 Conn. 494; *Hutchinson vs. Granger*, 13 Vermont, 386; *Pastorius vs. Fisher*, 1 Rawle, 27; *Arnold vs. Foot*, 12 Wendell, 330; *Hodges vs. Hodges*, 5 Metcalf, 205.

STONE, J.—(After stating the facts above set forth.) It will be observed that we have made no distinction between the water which Stein attempted to restore to the creek by his return ditch, and that portion which entered his pipes to be consumed in Mobile. No question was raised in reference to the latter.

The entire question in the case resolves itself into the inquiry, what property has a riparian proprietor in the water which flows through or by his land? "He has no property in the water itself, but a simple usufruct while it passes along." *Aqua currit, et debet currere*.—3 Kent's Com. 439. "He may use the water while it runs over his land, but he cannot unreasonably detain it, or give it another direction; and he must return it to its ordinary channel when it leaves his estate."—*Ib.*

In *Beissell vs. Sholl*, 4 Dallas, 211, it was held, that the owner of land, through which a stream flowed, had an unquestionable right to use the water passing through his land as he pleases; subject, among other things, to the condition, that *after using the water, he returns the stream to its ancient channel*.

In two other controlling cases in Pennsylvania, *McCalmont vs. Whitaker*, 3 Rawle, 84, and *Howell vs. McCoy*, Ib. 256, the right to the use of the water is distinctly stated; but it is added, that the person using it is bound to *return* the water, so diverted, without unnecessary waste or diminution, into the *natural channel*.

The old maxim, "*Sic utere tuo ut alienum non lædas*," is a cherished principle of the common law. It was early applied to the use of water flowing in a stream. As early as 32 Edw. III., where a proprietor had diverted water from its accustomed channel, to the injury of a land owner on the stream below him, it was adjudged, that "the water should be removed into the ancient channel, at the cost of the defendant." The same doctrine, in substance, was again asserted in *Brown vs. Best*, 1 Wilson's Rep. 174. See, also, *Bealey vs. Shaw*, 6 East, 208; *Wright vs. Howard*, 1 Sim. & Stu. 190; *Mason vs. Hill*, 5 Barn. & Adolph. 1.

In *Tyler vs. Wilkinson*, 4 Mason, 397, Justice Story laid down the same doctrine, in a well considered and forcible opinion. So also, in *Gardner vs. Village, &c.*, 2 Johns. Ch. 162, Ch. Kent, with his accustomed clearness, has given to the same side of this question the sanction of his splendid intellect. To the same effect, are *Coalter vs. Hunter*, 4 Rand. 56; *Hutchinson vs. Coleman*, 5 Halst. 74; *King vs. Tiffany*, 9 Conn. 162; *Blanchard vs. Baker*, 8 Greenl. 253; *Martin vs. Jett*, 12 Louisiana Rep. 501; *Smith vs. Adams*, 6 Paige, 435; *Colburn vs. Richards*, 13 Mass. 420; *Cook vs. Hull*, 3 Pick. 269; *Van Berger vs. Van Berger*, 3 Johns. Ch. 282; *Merritt vs. Brinkerhoff*, 17 Johns. 306; *Arnold vs. Foot*, 12 Wend. 330; *Hart vs. Evans*, 8 Penn. 1; *Hill vs. Sayles*, 4 Cush. 553.

To this long list of authorities, I might add others, almost without limit. I have not been able to find one authority which conflicts with them in principle. All hold the uniform language, that he who diverts water from its natural course, must restore it to its original channel, without material diminution. 2 Hill on Real Prop. 99-100.

In a well considered opinion, Ch. J. Ruffin, after endorsing, in substance, the above doctrine, proceeds to mention the uses to which all men may apply water; namely, *ad lavandum et potandum*.—

Pugh vs. Wheeler, 2 Dev. & Bat. 50. To these uses, other authorities have added, that he may use so much as may be wanted for his cattle.—*Brown vs. Best*, 1 Wils. 174; *Smith vs. Adams*, 6 Paige, 435. He cannot, however, consume the water, even in the irrigation of his land, to the detriment of riparian proprietors below.—*Arnold vs. Foot*, 12 Wend. 330; *Cook vs. Hull*, 3 Pick. 269. See, also, these several subjects ably discussed, with corresponding conclusions, in Angell on Water-Courses, pp. 83 to 100; 3 Kent's Com. 439 to 441; and numerous authorities cited by these latter authors.

This subject has been considered in this court. In *Hendricks vs. Johnson*, 6 Porter, 472, our predecessors said: "All proprietors of lands have precisely the same rights to waters flowing through their domains, and one can never be permitted so to use the stream, as to injure or annoy those who are situated on the course of it, either above or below him." * * * One occupying a position as a land holder above another, and on the same stream, "would be protected by the common law in the use of any dam he might choose to erect, if in so doing he caused no injury to [the proprietor below] by withholding the water of the stream from him."

In a case between the parties to this suit, for a former diversion of the water of the same stream, and by the same means disclosed in this record, this court used the language, "That a riparian proprietor has the right to consume even the whole of the water of a stream, if absolutely necessary for the wants of himself and family." * * "but this doctrine can have no application" to a case like the present.—*Stein vs. Burden*, 24 Ala. 130.

In a still later case between these parties, commenced by bill in chancery, it was said by this court, that Burden had "established his right as riparian proprietor to the use of the water in its accustomed flow, by proving that he is the owner of the lands on both sides of the creek, and that Stein [had] diverted the water in pipes to the city of Mobile."—*Burden vs. Stein*, 27 Ala. 104.

If these numerous citations settle any thing, they certainly establish, at least, the following propositions:

1. That each riparian proprietor has the right to use the water

which flows from or through his lands, for all ordinary purposes, and for the gratification of natural wants, even though, in such use, he consume the entire stream; that this right extends to the use of the water *ad lavandum et potandum*, both by himself, and all living things in his legitimate employment.

2. That such proprietor has also the right to the extraordinary or artificial use of the stream and the water composing it, provided that, by such use, the water is not forced back on the lands of the proprietor above, is not unreasonably and injuriously precipitated on the lands of the proprietor below, and, after its use, is restored, without material diminution, and before it leaves the lands of the person diverting, to its accustomed channel.

3. That if water be diverted for artificial use from its natural channel, in quantity sufficient to affect injuriously the rights of the proprietor below, and the water be not returned to its channel before it reach the lands of such proprietor, he may recover damages therefor of the party who causes the injury.

It is thus shown, that the right of a riparian proprietor, to divert water from its channel, is conditional; qualified by a corresponding duty, to restore the water thus diverted to the stream from which it was taken. The question is presented in this case, what is the extent of this obligation to restore the water? Is it continuing? If so, how long does it continue? Will any, and what excuse, avail to relieve a party from this obligation to return the water?

Evidently, as to such portion of the water as a party, under the above rules, may use in the gratification of ordinary wants, and a portion of which, in the nature of things, will perish in the using, no question can arise on the duty to restore. This is, generally, a use of the water itself, as severed and contradistinguished from the stream. This use is one of the incidents of riparian proprietorship, and does not trench on the freehold interests of the owners below.

The right to the stream, or the water in its aggregate character, is a different question. It consists of the *body* of water which at any and all times rests on and flows over the lands of the claimant. The stream is a part of the freehold.—*Burden vs. Stein*, 24 Ala. 130; same parties, 27 Ala. 104. This freehold character is not lost,

though the particular water which composes the stream is continually changing. Every owner has a property in the *stream* that flows through his land; while he has no property in the *water* of which it is composed, save for the gratification of his natural or ordinary wants as above shown.

A right to the use of a stream being a part of the freehold interest, that right is co-existent with the right to the land over which it flows. Diversion of the water of the stream is an act continuous in its character; and each effluence of the water, resulting from the unauthorized act of another, is a wrong done to a proprietor below, if thereby the flow of the stream to him is materially diminished.—*Burden vs. Stein*, 27 Ala. 113. It is a continuing nuisance; and an action lies for the damages, *toties quoties*.—*Burden vs. Stein*, 24 Ala. 147, and authorities cited. The maxim of the law is, *aqua curit, et debet currere ut solebat*. Each successive flow being a new wrong, a nuisance continued, imposes a corresponding contemporaneous obligation to return such water to the channel of the stream.

The argument, then, that a party who diverts water, and provides the means for its return, may then rest—that he may then continue to abstract large quantities of water, which water is not in fact restored to its accustomed channel, cannot be supported. It is no answer that the water would have continued to flow back into the stream, had not a stranger, by his unauthorized interference, rendered the means provided powerless to accomplish the object. He abstracts the water at his peril. His right to do so is not an absolute, but a qualified right. It only becomes a right, when by restoration, it ceases to work an injury to another. The diversion is *prima facie* a nuisance; and each continuance places the party under obligations to abate it. It is no defence, in such case, that the author of the act was willing to apply the corrective, but was prevented. This rule, under the circumstances, is not a severe one. It only enjoins that the assumed right to abstract shall be abandoned, whenever the water cannot be returned.

The argument against these views rests on the fallacy which places the diversion of water among the absolute rights of parties.

It is contingent; made absolute only so long as the diverted water flows back.

The charge as asked should not have been given. Both it, and the explanatory charge, laid down a rule too favorable to the appellant. The supposed excuse for not returning the water was wholly insufficient. The facts supposed in the explanatory charge would reduce the damages; but even they would not entirely excuse the wrong.—*Van Hoesen vs. Coventry*, 10 Barb. 518.

It was contended in argument, that the averments of the complaint and the proofs did not correspond; that the *gravamen* of the complaint is the act of Stein, while the testimony shows the injury to be the result of the act of another. It was also urged, that the damages proved are too remote from the act of Stein to justify a recovery against him. The numerous and respectable authorities cited, fully establish the legal principles contended for, if the facts of this case brought it within the influence of those decisions. But they do not. The liability in this case rests on the naked fact, that Stein, after diverting the water, did not return it; not on the *reasons* why he did not. His excuse for not returning, as we think we have shown, is wholly insufficient; and we not only know no rule of pleading which requires that such excuse or pretext should be stated, but we cannot conceive of any form or mode of expression, by which such immaterial fact could be presented in the complaint, without marring the proceedings, while it could not affect the result.—*Shears vs. Wood*, 7 J. B. Moore, 345.

The argument that the damages are too remote, is answered, when it is shown to be the duty of Stein to restore the water to the stream. Thus viewed, the injury to Burden is the direct result of Stein's wrongful act.

There is no error in the record of which appellant can complain, and the judgment of the City Court is affirmed.

RICE, C. J., dissenting.

RECENT ENGLISH DECISIONS.

In the Court of Exchequer.—Easter Term.

GIBBS AND OTHERS vs. GRAY AND OTHERS—GRAY AND OTHERS vs. GIBBS AND OTHERS.

A merchant loaded a Spanish vessel at C., chartered to deliver the cargo in London. The vessel put into an intermediate port disabled; whereupon the captain, without any communication with the merchant or his agents at that port, though aware of their existence, entered into a charter party with the captain of another vessel to take the cargo to its destination, which the charter party described to be 470 tons, the captain of the disabled vessel agreeing to load the other and pay freight at a rate per ton exceeding the rate of freight for which the first vessel was chartered. The vessel was loaded, and a bill of lading in accordance with the terms of the charter party was signed by the captain of the second vessel. On the arrival of the cargo at its destination it was discovered to be only 344 tons, and the merchant offered to pay freight on that amount at the rate agreed on by the charter party, which having been refused, he paid for 470 tons under protest, and brought an action for money had and received to recover the difference:—Held,

1. First, that the merchant was entitled to recover.
2. Secondly, that the master had no authority to bind the merchant to pay the freight mentioned in the bill of lading.
3. Thirdly, that the merchant was not liable in an action upon the charter party for the neglect to provide a full cargo.
4. Fourthly, that the representation in the charter party that the cargo amounted to 470 tons did not amount to a warranty.
5. Fifthly, supposing that representation had been a false and fraudulent one, the merchant would not be accountable for it.

This was a special case for the opinion of the court, which was argued on a previous day in this term by Cleasby and Tomlinson for the respective parties.

The questions involved fully appear in the judgment of the court. It will therefore be sufficient to add that the following authorities were referred to:—*Shipton vs. Thornton*, 9 Ad. & El. 414; *The Gratitude*, 3 Rob. Adm. 240; *Longridge vs. Dorville*, 5 B. & Al. 117; *Freeman vs. The East India Company*, *ibid*, 617; *Cross vs. Eglin*, 5 B. & Ad. 106; *Brigs vs. The Merchant Traders' Association*, 13 Q. B. 167; *Arthur vs. Barton*, 6 M. & W. 138; *Cornfoot*

vs. *Fowke*, *ibid*, 358; *Duncan vs. Benson*, 1 Exch. 537; *Windle vs. Barker*, 25 L. J., Q. B. 349; Abb. Ship. 367, 8th ed.; and Story on Agency, 69.—*Cur. adv. vult.*

The judgment of the court was now delivered by—

POLLOCK, C. B.—This was a special case for the opinion of the court. The pleadings were set out at length, but it is not necessary to state them with particularity, as it was agreed by the learned counsel that the real question arose upon the count for money had and received, and the question as to the right of the plaintiffs to nominal damages on the other count was not discussed.

The facts stated were, that in December, 1854, the plaintiffs loaded on board a Spanish vessel called the *Oriente*, at the Chinch Islands, a cargo of guano, which had been chartered by them, and for which the captain signed bills of lading, the guano being deliverable in London. In January, 1855, the *Oriente* put into Valparaiso, in a disabled state, and the cargo was discharged into a hulk, and it became necessary to tranship and forward the cargo by another vessel. On the 26th March the captain of the *Oriente* entered into a charter party with the captain of a vessel called the *Fairy Queen*, of which the defendants were owners. The charter party, purported to be between the master of the *Fairy Queen*, of the burthen of 318 tons register, or thereabouts, of the one part, and the master of the *Oriente*, “for account and risk of the owners of the cargo of said vessel, or whomsoever it may concern,” of the other part: and stipulated that the *Fairy Queen* should proceed alongside the hulk, and take on board therefrom “the cargo put on board thereof, and forming the cargo brought by the *Oriente*, being 470 tons of guano, more or less, not exceeding, &c., and therewith proceed to Cork for orders to proceed to any port in the United Kingdom, and there deliver her cargo;” and the Captain of the *Oriente*, as agent as aforesaid, agreed to load the vessel, and pay freight at the rate of 5*l.* 2*s.* 6*d.* per ton; and it was agreed that the captain of the *Fairy Queen* should sign the bill of lading, with a clause of “weight and quality unknown,” without reference to the rate of freight, and without prejudice to the charter party. The guano in the hulk was loaded on board the *Fairy Queen*, and what

further took place at Valparaiso appeared from the evidence of a Mr. Fox, the agent of the Fairy Queen at that place, and her captain. Mr. Fox stated the fact of the arrival of the Oriente; that her cargo was loaded on board the hulk, and that she was condemned, and that afterwards the charter party of the Fairy Queen was made; that before the charter party was made several discussions took place between the captains of the Oriente and the Fairy Queen as to the quantity of guano brought by the Oriente; that the captain of the Fairy Queen expressed fear that that quantity was not a full cargo for the Fairy Queen; that the captain of the Oriente said there was fully 470 to 500 tons, and more above than below that quantity, and wished to insist on the Fairy Queen taking 500 tons, which the captain of the Fairy Queen refused to consent to take; and that the Fairy Queen was preferred by the captain of the Oriente to a small vessel called the Annie Saunderson, on account of her greater size and capacity; that after the charter party was made, and the guano put on board the Fairy Queen, the captain of the latter vessel insisted that he had not taken more than 350 tons on board; that the captain of the Oriente insisted that he had more, and that ultimately both parties went to the office of the Spanish Consul, where it was agreed that freight should be paid on the full quantity of guano mentioned in the charter party, and, in order to carry out this agreement, a bill of lading was signed by the captain of the Fairy Queen, dated the 27th April, 1855. The bill of lading stated the loading of the guano on board in the usual way, to be delivered to Murieta & Co., or their assignees, he or they paying freight for the said guano as 470 tons, as per charter party. Murieta & Co. are the agents for the general average settlement of the Oriente, and their name was suggested by Mr. Fox for the benefit of the captain of the Fairy Queen. The captain of the Fairy Queen was willing to fill up the ship with other cargo, but none could be obtained, and the captain of the Oriente urged his immediate sailing. Upon the cross-examination of Mr. Fox it was proved that the plaintiffs had, to the knowledge of the captain of the Oriente and the witness, agents at Valparaiso, and that there was a house of Messrs. Gibbs & Co. there, and that no reference was made to them;

that the *Oriente*, being repaired, sailed from Valparaiso with a cargo, and that the loading of the *Fairy Queen* was finished at the least three or four days before the bill of lading was signed, and that the agreement introduced in it was made after the loading was complete. On his re-examination he stated that the current rate of freight from Valparaiso to England, at the time of the making of the charter party, was from 5*l.* to 5*l.* 5*s.* The captain of the *Fairy Queen* was also examined, and the substance of his evidence was, that after he had taken on board all the guano supplied to him from the hulk, he insisted that he had not more than 350 tons on board, and wanted 130 tons more; that the captain of the *Oriente* insisted he had 470 tons, and that then the agreement was made that he should be paid freight as for 470 tons, and that on this understanding he signed the bill of lading. He further stated that he was willing to load other cargo, and that on the 29th April he received a letter from the captain of the *Oriente*, urging him to sail at the earliest possible opportunity; that he did so, and arrived in London, on the 4th of August following, having called at Cork for orders. The case then proceeded to state that the plaintiffs procured the bill of lading of the guano to be endorsed to them by Messrs. Murieta. The cargo loaded and delivered was 344 tons only. The plaintiffs offered to pay freight upon this 344 tons at the rate of 5*l.* 2*s.* 6*d.* per ton, being the rate fixed upon by the charter party. The defendants insisted upon being paid at that rate upon 470 tons, the quantity which might have been loaded on board, and what they alleged was payable according to the substituted agreement and the bill of lading. The result was a correspondence of some length, and ultimately, by arrangement, the plaintiffs paid, under protest, a sum of 2,388*l.* 13*s.* 9*d.*, being the freight of 5*l.* 2*s.* 6*d.* upon 470 tons, and exceeding 645*l.* 15*s.* the freight payable on the actual quantity delivered at the same rate.

The questions stated for the opinion of the court in the first of these actions, *Gibbs and others vs. Gray and others*, are whether the plaintiffs are entitled to recover back the sum of 645*l.* 15*s.*, and also nominal damages in respect of the detention of the cargo. The first question only has been argued before us, the other being in reality a mere question of the costs of the pleadings.

In the argument all the authorities existing, or indeed, as we believe, bearing at all upon the question, were cited.

The well-known case of *the Gratitude*, 3 Rob. Adm. 240, and that of *Duncan vs. Benson*, 1 Exch. 537, were fully referred to; but it was argued by both the learned counsel that there was very little existing authority in English law upon the subject, and that the case of *Shipton vs. Thornton*, 9 Ad. & El. 314, and a section in Abb. Ship. 367, 8th ed., are the most material, and the most directly bearing upon it. The question is of great difficulty, and has led to much difference of opinion amongst the most eminent foreign writers on jurisprudence; but it is more especially so in the law of England, which regards with extreme jealousy the permitting any man to be bound by contract or act of another, except direct and express authority be given to him.

In the present and similar cases a merchant has loaded on board a ship a cargo, upon a contract that it is to be conveyed *in that ship* from the port of loading to the port of discharge, and a provision is contained in the contract that the shipowner is to be excused from so doing if prevented by certain perils mentioned in it. A master is placed in command of the ship, over whose appointment the merchant has no influence or control. One of the perils occurs in the course of the voyage, which, according to the contract, excuses the shipowner from conveying the cargo further; but the master, instead of acting upon it, determines to forward the cargo by another ship, of which the merchant knows nothing, and in regard to which he has no opportunity of exercising any selection or choice. The question is, what contract, if any, the master can make obligatory upon the merchant in regard to the conveyance by the substituted ship.

When the merchant has an agent or a house of business, to the knowledge of the master, at the intermediate port where the ship has put into in distress, can he, without communication with them, or giving them the option of receiving the cargo there, put it on board another ship, and forward it to the port of discharge?

We are not aware of any authority in the English law in which the master is said to have such power.

In *Shipton vs. Thornton*, Lord Denman, in delivering the judg-

ment of the court, only put the case "where the shipowner or master has no opportunity of consulting the freighter;" and in the section of Abbott on Shipping before referred to, the learned author says, "the merchant should be consulted if possible." In the present case the plaintiffs had an agent at Valparaiso, and indeed it would seem that a branch of the house carrying on business in the same name was established there; and it is stated in the case, that although all the parties knew this, no reference or communication whatever was made them.

Again: has the master authority to contract that the merchant shall pay a rate of freight higher than that originally stipulated? In the present case the rate of freight by the *Oriente* is not stated, but we have no doubt that the rate of freight demanded and paid under protest, which was nearly 7*l.* per ton, was considerably higher than the original rate of freight by the *Oriente*.

Again: has the master authority to bind the merchant to a charter party, contracting not merely for the conveyance of the cargo, but for dead freight, or is his authority confined to loading the goods on board the substituted ship under the ordinary contract by a bill of lading?

Many other difficulties will readily suggest themselves to any one who has considered the subject; but upon the question in the present case we are all of opinion that the master of the *Oriente* had not authority to bind the plaintiffs to pay the freight mentioned in the bill of lading. He had made a charter party at the rate of 5*l.* 2*s.* 6*d.* per ton for freight, containing a stipulation as to the loading of a full cargo. All the guano was put on board, and no more was forthcoming. The consequence was, that a right in the nature of a chose in action had arisen against the person who was bound by the charter. On this state of things we are of opinion that the master had not authority to substitute or create against the plaintiffs (assuming them to be liable on the charter) a lien upon the cargo in respect of this chose in action, or, in other words, to create a lien for dead freight; and we think that the plaintiffs are not then to be liable for any thing beyond the freight mentioned in the charter party, which was the current rate of freight at the time at Valparaiso, and are therefore entitled to recover back the further sum

which they were compelled to pay under the circumstances mentioned in the case.

The case of *Gray and others vs. Gibbs and others*, is a cross action, and the special case upon the same facts states the question for the opinion of the court to be, whether the defendants in this action are liable on the charter party of the *Fairy Queen* for the neglect to provide a full cargo. We are very strongly inclined to be of opinion that the master of a ship has not authority, under such circumstances as the present, to charter a ship, and bind the merchant to provide a full cargo, or, in other words, for the payment of dead freight. If he has such authority, what is the limit to it? Can he, when the goods of the merchant are only sufficient to fill the ship to the extent of one-half or three-fourths of its capacity, enter into a contract obligatory upon the merchant to pay for the unoccupied space? It may be that the master of a disabled ship has power to send forward the cargo to the port of discharge by another ship, and upon that taking place, which would be a performance of the contract, if the original ship had arrived in safety, the master or owner may be entitled to the freight originally contracted for, the conveyance of the cargo by, and the right and true delivery from, the substituted ship being deemed a substantial performance of the voyage, and equivalent to the conveyance by, and right and true delivery from, the original ship. But we think in this case that all which by the charter party was contracted to be loaded was the cargo of the *Oriente*. The words of the charter party are:—*The cargo put on board the hulk, forming the cargo brought to Valparaiso by the Oriente, being 470 tons of guano, more or less.*" It is clear from the charter party itself, and proved beyond all doubt by the evidence, that the cargo was represented to be 470 tons at the least, but we do not think there is a warranty to this effect. If there be no warranty, the only liability which could exist would be for a false and fraudulent representation. This is not alleged to have been the case, for the statement of the captain of the *Oriente* is admitted to have been an honest one; but if it were not, the defendants, Messrs. Gibbs, would not be responsible for it. There is no authority or principle for holding that the owners of a

cargo are, under such circumstances, liable for a false and fraudulent representation by the master.

The result, therefore, is, that the verdict is to be entered for the plaintiffs in the first action for 645*l.* 15*s.*, with interest from the 18th August, 1855, on the issue on the first count, and that, as to the other issues the jury be discharged; and, as to the second action, that the judgment be for the defendants.

In the Court of Exchequer, April, 1857.

DYNEN vs. LEACH.¹

1. Where an injury happens to a servant while in the actual use of an instrument, engine or machine, in the course of his employment, of the nature of which he is as much aware as his master, and the use of which is, therefore, the proximate cause of the injury, he cannot, at all events if the evidence is consistent with his own negligence in the use of it being the real cause, nor in case of his dying from the injury can his representative, under Lord Campbell's act 9 & 10 Vict. c. 93, recover against his master, there being no evidence that the injury arose through the personal negligence of the master. Nor is it any evidence of such personal negligence of the master that he has in use in his works an engine or machine less safe than some other which is in general use.
2. Therefore, where a laborer was killed through the fall of a weight which he was raising by means of an engine to which he attached it by fastening on to it a clip, and the clip had slipped off it, it was held that there was no case to go to the jury in an action by his representative against the master, although it appeared that another and safer mode of raising the weights was usual, and had been discarded by the orders of the defendant.

This was an action, brought in the Passage Court of Liverpool, by an administratrix, under Lord Campbell's Act, 9 & 10 Vict. c. 93,² which provides for compensation to the families of persons killed by accident.

The declaration stated that the intestate was a servant of the

¹ 26 Law Jur. 221 Ex.

² A Similar act has been passed in many of the States of the Union. See 1 Tidd's Prac., 9. 3d Am. Ed. notes.

defendant, employed by him in his business as a sugar-refiner, on the terms that the defendant would take due and ordinary care that the intestate should be exposed to no extraordinary risk in the course of his said service; but that the defendant wrongfully exposed him to extraordinary risk in the said employ, so that, through the carelessness of the defendant, a sugar-mould fell upon the intestate while he was engaged in the said service and caused his death.

Pleas—First, not guilty; second, a denial that the intestate was employed on the terms stated.

At the trial, the plaintiff's counsel stated the case thus:—That the defendant was a sugar-refiner, and had employed the intestate as a laborer; that it was part of the intestate's duty to fill the sugar-moulds and hoist them up to higher floors in the warehouse by means of machinery; that the usual mode of attaching the moulds to the machine was by placing them in a sort of net-bag, and which effectually prevented any accident; that this was the mode adopted by the defendant until, from motives of economy, he substituted a kind of clip, which laid hold of the rim of the mould; that the deceased, on the occasion in question, had himself filled the mould, and fastened it to the clip, but that, when it was being raised, the clip, by some jerk, slipped off the mould, which fell on his head and killed him. The learned judge on this statement, nonsuited the plaintiff, but gave him leave to move to set the nonsuit aside.¹

C. Blackburn, now moved according to the leave reserved.

MARTIN, B.—Does not the case come within the principle of *Priestley vs. Fowler*,² and the class of cases decided upon it?³

POLLOCK, C. B.—These cases show that the deceased could not have recovered against his master for an injury caused by the negligence of a fellow-servant⁴; can his representative, then, recover for a death caused by his own negligence? He himself fixed the clip.

¹ And stated and signed a case for the purpose, of which the above is the substance.

² 8 Mee. & W. 1; s. c. 7 Law J. Rep. n. s. Exch. 42.

³ *Vide* Wigmore vs. Jay, 19 Law J. Rep. n. s. Exch. 800.

⁴ And the representative cannot recover for the death in a case in which the deceased could not have recovered for an injury, *vide supra*, *et vide* Hutchinson vs. the York, Newcastle and Berwick Railway Company, 19 Law J. Rep. n. s. Exch. 296

The negligence imputed is not in the way of fixing the clip, or in the manner of using it, but in the use of it at all. It is not the usual mode, and not a proper mode of raising the mould.

BRAMWELL, B.—As to its not being usual, that is immaterial. It was unsafe.

POLLOCK, C. B.—Then the deceased should not have used it.

There is a recent case in the House of Lords which seems to show that it was the duty of the master not to have adopted such a mode—*Patterson vs. Wallace*.¹ There, in an appeal on a Scotch case, the Lord Chancellor, in giving judgment, said that the law in England and Scotland on the subject was the same; and that when a master employed his servant in a work which was dangerous, he was bound to take all reasonable precautions for the safety of his workman.

POLLOCK, C. B.—That was an *obiter dictum* as regards the law of England; the appeal being from Scotland.

No doubt, it is no direct decision on the question, but is a weighty expression of opinion.

POLLOCK, C. B.—But it must be taken with reference to the facts.

The master was a miner; the workman had pointed out that a stone overhanging the works was dangerous and likely to fall, and it did fall soon after and killed him. The House of Lords held,

¹ 1 McQueen's Reports of Scotch cases in the House of Lords. 748 See also *Brydon vs. Stewart*, 2 Ibid. 30, in which the Solicitor General (for the defendant, the master,) citing the former case, says "the law of both countries on questions of this sort is the same, except that in Scotland it would appear that a master is responsible for injuries done by a fellow workman; and the Lord Chancellor in giving judgment said, 'a master by the laws of both countries is liable for accidents occasioned by his neglect towards those whom he employs.'" There the action was by the representatives of a miner who had been killed by the fall of a stone upon him while he was being drawn up through the shaft of the mine, "the stone falling by reason of the shaft being in an unsafe state from causes for which the master, the defendant, was responsible." That was the form of the issue on which the jury found for the complainant. See as to the difference between the law of England in such cases as regards master and servant, *Seymour vs. Madox*, 20 Law J. Rep. n. s. Q. B. 327, *Hutchinson vs. the York, Newcastle and Berwick Railway Company*, 19 Law J. Rep. n. s. Exch. 296; and as regards strangers, *Reedie vs. the London and North-Western Railway Company*, 4 Exch. Rep. 244, *Barnes vs. Ward*, 9 Com. B. Rep. 392; n. c. 19 Law J. Rep. n. s. C. P. 115.

that, by the law of Scotland, there was a case to go to the jury So there was in the present case.

BRAMWELL, B.—The case is clearly distinguishable.

In circumstances, but not in principle.

BRAMWELL, B.—There the workman had no connection or concern with the cause of accident, whereas here he was in the actual use of it.

No doubt; but it was not his fault that it was perilous.

POLLOCK, C. B.—There was no contract, and there was no general duty thrown by law upon the master to the effect stated in the declaration. If the work is more than ordinarily dangerous, the servant should know it and decline to continue in it.

There is no legal presumption that an unskilled laborer should know the nature of machinery employed.

POLLOCK, C. B.—Every workman is bound to know the nature of the instrument he uses. Even a hammer or a ladder may be dangerous.

It was surely for the jury whether the particular mode of raising the mould was unsafe, and whether the deceased could know it?

POLLOCK, C. B.—No; there was nothing for the jury. As to the method being usual, there was no evidence, except that a safer method had been used; but a master is not bound to use the safest method. A pair of steps is safer than a ladder, but business could not go on if ladders were discarded. And as to the man's knowledge, he was bound to know what he actually did; he himself fastened the clip, and it would be impossible for the jury to tell whether it was his careless mode of doing it which caused the accident.

It would be for the jury on the whole whether the method was reasonable and proper.

POLLOCK, C. B.—No; if the man did not think it so, he should have left. A servant cannot continue to use a machine he knows to be dangerous, at the risk of his employer.

He might not know it, and his means of knowledge would be a question for the jury.

POLLOCK, C. B.—No; it is a question of law.

BRAMWELL, B.—There was no evidence that the method was

improper ; that it was less safe than another did not make it improper to be used.

POLLOCK, C. B.—The deceased not only contributed to the accident which caused his death, but did the act which directly caused it. It is impossible to speculate as to the cause, but it is consistent with the evidence that it was his own carelessness in fastening the clip. At all events, his own act was the proximate cause of the occurrence, and it is impossible to hold that to be a ground of action.

BRAMWELL, B.—There is nothing legally wrongful in the use by an employer of works or machinery more or less dangerous to his workmen, or less safe than others that might be adopted. It may be inhuman so to carry on his works as to expose his workmen to peril of their lives, but it does not create a right of action for an injury which it may occasion when, as in this case, the workman has known all the facts and is as well acquainted as the master with the nature of the machinery and voluntarily uses it. That was not so in the case cited from the House of Lords, in which the workman had nothing to do with the stone the fall of which was the proximate cause of the occurrence. Here on the contrary, the workman's own act was the proximate cause. Whether, therefore, on the principle that the party contributed to or was the proximate cause of the injury, or upon the principle that a servant cannot sustain an action against a master for the mere negligence of a servant, this action cannot be sustained.

CHANNELL, B.—If I were to speculate on the cause of the accident, I should be disposed to think that it was the careless fixing of the clip by the defendant himself. But we cannot speculate on that point; and I rest my judgment on the ground that the deceased himself continued in the employ of the defendant and in the use of the clip with full knowledge of all the circumstances, so that he directly contributed to the accident.¹

¹ As to this defence, where the plaintiff has employed the defendant to do work, &c. see *Dakin vs. Brown*, 8 Com. B. Rep. 92, s. c. 18 Law J. Rep. x. s. C. P. 344; as to the personal negligence reputed to sustain such an action by a servant against his master, see the judgment in the recent case, *Scott vs. the Mayor of Manchester*, 26 Law Jour. Rep. p. 132, *vide* particularly, p. 134.

In the Exchequer Chamber, May, 1857.

ROBERTS vs. SMITH AND ANOTHER.¹

The defendant, a master builder, being engaged to repair a house, employed one of his workmen, A., to erect the scaffolding for that purpose. A. knew how to build scaffoldings. The materials which were supplied to him by the defendant were in bad condition. The workman broke several of the putlogs, (the pieces of wood between the wall and the upright poles), but was ordered by the defendant not to break any more, as they would do very well. The scaffolding having been erected by A. of the materials which were furnished to him, an accident happened to another workman, B., in consequence of the bad condition of the putlogs:—Held, in an action by B. to recover compensation for the injuries received, that there was evidence to go to the jury in support of the plaintiff's case, and that such evidence ought to have been left to the jury.

This case came before the court by way of appeal from the Court of Exchequer. The declaration stated, that before and until and at the respective times of the plaintiff entering into the service of the defendants, and the committing of the grievances hereinafter mentioned, the defendants carried on the business of carpenters and builders; and thereupon the plaintiff, being a bricklayer, entered and was received, and until the time of the said grievances remained and continued in the service and employ of the defendants, in the way of their said trade, upon the terms and conditions, amongst others, that the defendants should take and use all due, reasonable, and proper means and precautions in order to prevent accident, damage, or injury, or unreasonable and unnecessary risk or danger from happening or occurring to the plaintiff in the performance of his duty as such servant of the defendants; and although the plaintiff did all things, and all things concurred and happened, which were necessary to entitle him to have the said terms and conditions performed by the defendants, yet the defendants did not take or use such due or reasonable or proper means or precautions as aforesaid, but altogether omitted so to do; and by reason thereof, and of the default and neglect of duty of the defendants in that behalf, the

¹ Appeal from the Court of Exchequer. 21 Jur. 469.

plaintiff was directed and employed by the defendants, as such their servant as aforesaid, to perform certain work upon the wall of a house, and for that purpose to be and remain at a great height from the ground, upon a certain scaffold affixed to such house, and which scaffold, for want of the use of such means and precautions as aforesaid, and by reason of the negligence and default of the defendants in that behalf, then was and remained constructed very unsafely and insecurely, and in such a defective, rotten, and improper state and condition as to render it dangerous to be and remain upon the same for the purpose of doing the said work, which the defendants then well knew, but whereof the plaintiff was wholly ignorant; and in consequence thereof, whilst the plaintiff was so engaged as aforesaid, a part of the said scaffold broke and gave way, and the plaintiff was precipitated and fell to the ground with great violence. [Then followed a description of the injury.] The defendants pleaded—first, not guilty; secondly, that the plaintiff was not employed on the terms and conditions and in manner in that behalf in the declaration alleged. At the trial, which took place before the Lord Chief Baron at Westminster on the 29th November, 1856, the following evidence was given on behalf of the plaintiff. The plaintiff proved that he was engaged by one White to go into the employ of the defendants; that he was sent to the house, and that while he was upon the scaffold doing his work the scaffold broke; he fell to the ground and broke his thigh: that the putlog broke. In cross-examination he stated—“White engaged me. My attention was not directed to the state of the putlog; it was under the board upon which I was standing. The man who built the scaffold knew well how to do it. The putlog rested on the window-sill.” John Nelligan was examined, and swore—“I am a laborer. I was employed to get the scaffolding out of Mr. Smith’s yard to erect the same. It is usual to examine the poles, &c. I examined the materials; I found them in bad condition, light, and worm-eaten. I broke several that were rotten and worm-eaten. William Smith came afterwards; he asked me who broke the putlogs. I told him I did. He then told me I had no business to do so, and said, ‘They will do very well, as there was no bricks or mortar going on.’ He said,

‘Don’t break any more.’ I put aside such as I thought sound. I was not there when the accident happened. I used three putlogs where one would have done. I have been a laborer and scaffolder for twenty-five years. A sound putlog ought to bear from 15 cwt. to 1 ton, or twenty men. The putlogs appeared as if they had got the rot.” Other evidence was given to the same effect. At the conclusion of the plaintiff’s case it was objected that there was no evidence to go to the jury; and on that ground the Lord Chief Baron directed a nonsuit, with liberty to the plaintiff to move for a new trial if there was evidence to go to the jury. A rule was afterwards obtained by the plaintiff, calling upon the defendants to show cause why the nonsuit entered on the trial, and the judgment signed thereon, if any, should not be set aside, and a new trial had, on the grounds that there was evidence for the jury in behalf of the plaintiff’s case, and that the evidence ought to have been left to the jury for them to decide upon it. It was agreed between the plaintiff’s and the defendants’ counsel, in order that the plaintiff might appeal, that the rule should be discharged by the Court of Exchequer; and it was against this ruling by such arrangement that this appeal was brought.

Temple, (*C. Wray Lewis* with him), for the plaintiff.—There was evidence here to show negligence on the part of the defendants themselves, and the Chief Baron was wrong in not leaving that evidence to the jury. The accident was caused by the breaking of the putlogs. There was evidence to go to the jury upon which the plaintiff would be entitled to a verdict; but if there was any evidence, that would be sufficient. It is not intended to dispute the correctness of the decisions in *Hutcheson vs. Yorke*, 19 L. J., Ex., 296, and *Priestley vs. Fowler*, 3 M. & W. 1, for those cases are not conclusive upon the point raised in the present case. *Paterson vs. Wallace*, 1 Macq. 748, is in point. In that case an action was brought upon the ground that the deceased had lost his life by reason of the masters’ negligence, through their agents having carelessly left a very large stone upon the roof of a mine in so dangerous a position that it fell upon the workman, when engaged in digging out the coal, and killed him upon the spot. Evidence was given to

show that the deceased and the other men employed in the mine had pointed out to the underground manager of the mine that the roof was in a very dangerous position; that he made some answer intimating that there was no danger, but that he afterwards sent some persons down to remove the stone. Before this was done, however, it fell, and killed the deceased. The Lord Chancellor Lord Cranworth said, "Now, in order to recover damages, the family must establish two propositions: first of all, they must show that the stone was in a dangerous position, owing to the negligence of the masters; and next, that the workman whose life was forfeited, lost it by reason of that negligence, and not by reason of rashness on his own part." And again—"It was not for the court below, nor is it for your Lordships, to say what would have been the conclusion at which the jury would have arrived, or ought to have arrived, upon the evidence. The question for the court below and for the House is this—was there evidence that might by possibility justly have led the jury to come to a conclusion in favor of the plaintiffs upon both the propositions to which I have adverted?" And again—"The question is, what ought to have been said by the judge to the jury after the evidence had been given? It was his duty to point out to them the evidence which bore upon the two propositions, namely, whether there had been a want of timeous removal, as they call it, upon the part of the masters, and whether they were satisfied that Paterson came by his death, not by reason of his own rashness, but by reason of his having so implicitly relied upon the assurances which were given him by the underground agent." *Brydon vs. Stewart*, 2 Macq. 30. In the marginal note is—"A master is bound to take all reasonable precautions to secure the safety of his workmen. It is no answer to the claim of damages by the surviving relatives of a workman accidentally killed in a mine, which was not in a safe and sufficient state, to say that he was at that moment of time in the act of leaving the work for a purpose of his own." Lord Brougham says, "the master is answerable for the state of his tackle, which in the present instance was defective, and had occasioned this lamentable accident." Upon the authority of these two cases it might be successfully con-

tended that the judgment of the court ought to be in favor of the appellant, without the evidence of Nellegan, but that witness gave evidence which was quite conclusive as to negligence on the part of the masters themselves. It is true that he used the best materials he could out of the stock of the masters, but the masters would not allow him to test any more of the putlogs, and were informed of the bad state in which they were.

Knowles, for the defendants.—The ruling of the Lord Chief Baron was correct. Where a workman enters into the employ of a master, the business being of such a description as that he will be aware that the master will not be personally employed in the erection of the building, but that his fellow-workman will be so, and an injury occurs to him in the course of his employment, the master is not responsible if he has used due care in choosing his workmen. *COCKBURN, C. J.*—Not only the workmen, but the materials also. No doubt he must employ servants who will look at the materials; and here it appears that Nellegan put aside such as appeared to him to be sound. The duty of the master does not go so far as is alleged in the declaration; though he employs an unfit person, he is not responsible if he has taken due care in choosing him. In *Seymour vs. Maddocks*, 16 Q. B. 326, it was alleged that the defendant had suffered the floor of his theatre to be insufficiently lighted, and a hole to be open without sufficient fence, so that the plaintiff, a performer, was injured by falling into the hole; and it was held, that the duty, a breach of which was laid, did not arise from the particular facts stated in the declaration, nor from the general relation of master and servant. *WIGHTMAN, J.*—If the allegations had been the same there as in this case there might have been a different construction of the matter. *Tarrant vs. Webb*, 18 C. B. 797, was a case in which an action was brought to recover damages for an injury sustained by the plaintiff from the falling of a scaffolding on which he was working in the employ of the defendant, a house decorator. *JERVIS, C. J.*, said—"The rule is now well established that no action lies against the master for the consequences to a servant of the mere negligence of his fellow. The master *may* be responsible where he is personally guilty of negligence, but certainly

not where he does his best to get competent persons. He is not bound to warrant their competency." Here the defendants have employed competent persons to do the work; they did not do it themselves, and cannot be held responsible for the result of the breaking of the scaffolding.

Temple was not called upon to reply.

PER CURIAM.—There was certainly evidence to go to the jury, and there must be judgment for the appellant.—*Judgment for the appellant for a new trial.*

NOTICES OF NEW BOOKS.

REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPREME COURT OF THE UNITED STATES, December Term, 1856. By BENJAMIN C. HOWARD, Counsellor at Law. Vol. XIX, Washington: William M. Morrison & Co. 1857. pp. 662.

Charles Lamb once, when a child, after studying for some time the epitaphs in a crowded church-yard, innocently inquired "where all the bad people were buried?" A retrospect of the literary notices of this and other legal journals for a few years, has forced upon our minds a similar inquiry, "Who writes or publishes the bad law books?" Certainly such there must be, yet our memory turns back in vain over a dreary waste of goodness, and distracts us with the impossible excellence of all the authors, publishers and printers that have ever come under our notice. So invariably admirable have they been in everything, from text to type, that if Arcadia, too, had its lawyers and booksellers, from that stock must they have sprung. Even if a little rivalry has occasionally exhibited itself in law calf, between Menalcas and Damoetes, it did not disturb this pastoral happiness, for the ever amiable critic soon harmonized them with his equal praise, and declared to each,

"Et tu vitula dignus et hic,"

Of this monotony of perfection we, as editors, have some little right to complain. It has exhausted our stock of laudation. We have honored every draft on our praise, and now we have apprehensions lest our bank may be forced to suspend. Yet we have done our best. Every change has been rung on the accuracy, the fullness, the brevity, the clearness, the

learning of the author, and all sorts of harmonious antitheses of conflicting qualities have been made to result from the shaking up of these few epithets of all work, just as we have such a series of brilliant effects in the kaleidoscope from the turning of a few bits of colored glass. Type and paper, too, have run their narrower circle of praise. We have sworn "eternal friendship" successively to every publishing house in the country. And that mystical and portentous abstraction, "The Profession," has been urged to admire and buy upon so many and such varied pleas that the fertility of our invention has really been a surprise to ourselves.

On the other hand, on beginning our career, we laid in the usual store of critical weapons. We have still piled away a whole arsenal of bitter vituperation, of scathing ridicule, of indignant denunciation, such as every well conducted journal should have on hand, and which some seem to be lucky enough to keep in constant use. But we have had no such good fortune. Our arms are rusting away in private, in these melancholy days of peace and admiration towards our neighbor, like that famous stock of muskets that a New York merchant once bought, and could never find what to do with thereafter; and like him, too, having wasted all our compliments and stored our ill-nature, with empty hold and unspent ammunition, we seek some lawful use for our artillery, that we may never be tempted to fillibustering attacks upon the innocent good books of which we have spoken above. Will not somebody write a very bad book?

In the meantime, and waiting this, we have endeavored to lay hold of some only comparatively bad book to review, just for a little practice, and to hide the bankruptcy of our vocabulary of praise. It has proved no easy task. We thought for a while of the copious Mr. Shorterman's editions of Serjeant Stubbs' book on *Ne Exeat*, and of Graeme on motions in arrest of judgment, in which these authors have been fairly swamped in a muddy mass of crude notes on every possible subject, or where a slender wire of text stretches drearily through a wilderness of comment. We looked hopefully at another recent "American edition" of a book on a very comprehensive branch of law, in which a solitary but quite irrelevant American case is cited with perfect regularity at the foot of every twenty-seventh page, as though it had been edited by some intermittent machinery connected with the printing press. But; unfortunately, the books themselves were good and useful; it was only the "mustard was naught." We then turned cheerfully to some late Commentaries on Penal Law, in which the writer has calmly appropriated his predecessor's authorities, if not more, without acknowledgment; but we had not quite a fair subject even here, for

the book had much merit, and the typography and general *mise en scene* of those eminent publishers, Messrs. Large & Black, are of course always excellent, and have the effect of obliterating all minor distinctions.

At last we fell on the nineteenth volume of Mr. Howard's Reports.

Now, we must premise that we have no very warm animosity to a man who writes obscure, feeble, or inaccurate text books. He may do so if he likes, without much harm. We are not obliged to read them. If we choose to do so, the collection of authorities at least is usually valuable, and the most stupid man, who has brooded over his subject a long time, must hatch some little original thing now and then. At the worst they are pleasanter reading than a digest. But a bad reporter always earns our unmixed reprobation. His book we must have and study, and the waste of time and vexation of mind which his blunders create are apt to be set down to his account in no pleasant spirit or euphuistic terms. We are forced to hire him at an annual salary; and his only service is to disfigure the good materials placed in his hands. Any man who has ever lost a cause by relying on an erroneous syllabus, or is often obliged to stop in the hurried preparation of a case to try and comprehend an incomprehensible report, has acute feelings on this subject.

Such reporters—and Mr. Howard not least among the number—we rank among the public enemies. He himself is the reporter of the highest tribunal in the United States, and that which to foreign countries is the representation of the very roof and crown of our judicial system. However much habit may have weakened its effect on the mind, there is certainly something most august and reverend in the idea and constitution of the Supreme Court. A body whose general jurisprudence is that of nations rather than individuals; a court whose bench and bar are composed of the topmost men of a people which has developed the science of law in more varied lights, and studied it more profoundly than any other; a tribunal in whose pacific arbitrament rest those high arguments which can set Europe in a blaze of war, is of certainly no mean dignity, and should have a fit exponent of its judgments. Yet how are its decisions reported? Why, in a manner that is admitted to be a disgrace to the country. What must English judges and lawyers think, accustomed as they are to their own admirable reports, to find the decisions of Taney or Story, or the other lights of commercial law, to whom they look, in such setting as the series before us? What opinion can they have of our judges and lawyers who can tamely submit to be caricatured in such a manner?

The first of these volumes were wretched; complaints and remonstrances

were made, and the last of these volumes are still wretched. It was to be hoped that pride would supply that in which industry or conscientiousness was lacking. But no improvement seems to have been even attempted. It is not worth while to enter into the details of Mr. Howard's defects, which are too well known. It is enough to say that the head notes, when comprehensible or correct, which is not the case with more than half of them, are vague statements of the common-places of the law, which had dropped from the judges in their opinions, and which, being both new to and understood by the reporter, he has borne off in triumph. The statement of facts is generally a mere "muddle," and the arguments of counsel, when any are given, are no better. Indeed, it provokes us beyond the bounds of patience to find those grand arguments in which the giants contended, the arguments of Webster, and Clay, and Binney, and the other masters of common and constitutional law, whose reasoning weighs with us scarcely less than the judgment of the court itself,—to find them, we say, so botched and mangled and belittled that not even the *torso* of the colossus remains.¹ And the index is always constructed on the plan of tossing together all the syllabuses under the three comprehensive heads of Chancery, Commercial Law, and Constitutional Law, without any further attempt at subdivision.

In this volume, Mr. Howard has added the one thing left to complete the unworthiness of his work. Formerly, when these reports were printed by Little & Brown, their mechanical execution was some slight consolation. But now he publishes in Washington, and the type and paper are on a par with the contents of the volume. Really, it is time that some one should speak out honestly with respect to the great disregard for the simple and plain duties of his post which the reporter has always shown.

In the foregoing observations we have not been actuated by the slightest ill feeling against Mr. Howard himself, with whom we have no personal acquaintance. We believe that he belongs to that class of estimable but rather incapable gentlemen of the old school, who have the most deserving political and social connections, and for whose support the Federal Government has mainly intended to provide. When these get quiet, profitable posts, we are always well pleased, as they infuse a tone of placid respectability into the Government, which is necessary to temper the rude progress

¹ For instance, read the argument of counsel in the Girard College case, in 2d Howard, and see what incoherent balderdash the four perhaps most famous lawyers in this country are made to talk, in a struggle too which was *pro corona*!

of Democracy. They constitute, indeed, one of the most amiable features of our institutions.

We cannot forget, however, that office partakes in some degree of the character of a trust, and is not altogether intended for the benefit of its incumbent. Not, indeed, that we would expect him, in such cases as the present, to do its work himself. We generally have cause to regret it if he does. He is not appointed for that purpose. What we desire and expect is that he will get some competent deputy. This is an understood thing. The respectabilities are to be supported by one and the work accomplished by another; for men differ in their gifts. Perhaps hereafter some different plan may be devised for uniting the two.

In the meantime, and in conclusion, we would suggest to Mr. Howard that there are hundreds of needy lawyers throughout the country who are abundantly able to get up a capital set of reports, who would do it perhaps for a tithe of the salary, and who would still leave his name on the title page. This course would please every one. The reporter would be rid of barking critics like ourselves, the needy lawyer would get a lift in the world, and the public would at last obtain a decent series of United States Reports, which they have not had for the last twenty-five years.

AN ABRIDGMENT OF THE LAW OF NISI PRIUS, by WILLIAM SELWYN, of Lincoln's Inn, Esq., &c. With Notes and References to the Decisions of the Courts of this country, by the former Editors, HENRY WHEATON, THOMAS I. WHARTON, and EDWARD E. LAW. Seventh American edition, with additional Notes and References to American Cases, by ASA I. FISH; from the eleventh London edition. Philadelphia: Robert H. Small. 1857. Two vols. pp. 1,523.

A new edition of this standard work has been long desired. Among the earliest of the treatises on the law of Nisi Prius, it has survived even its later rivals. It has done so deservedly. It is much the best book on the subject. It is clearly written, well arranged, copious in its citation of authorities, and preserves the happy mean between practice and theory, which is essential in a work of this kind.

The bulk of the American notes has been long before the profession, and the names of the former editors have been a sufficient guarantee of their value. Mr. Fish has performed his part of the task with care and fidelity, and has added much useful material. It would not be becoming for us to say more, but we can safely recommend the book to our readers as an admirable compendium for practical use.

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An attorney at law, guardian of minors, can lawfully charge his wards for professional services, in conducting litigation for their benefit. In the matter of David Mumma's Account, - - - - - 489

ADJOINING LAND.

See Riparian Owner.

ADMIRALTY.

See Lien.

1. The courts of the United States have jurisdiction in all civil causes of admiralty jurisdiction and have it exclusive of the courts of the several States, except as to the common law remedy. *Ashbrook vs. The Golden Gate*, - - - - - 148
2. A lien given by the general maritime law is a vested right, and the legislature of a State can pass no law to impair it. *Ibid.*
3. A material-man who has a lien under the general maritime law of the United States has a right to enforce that lien in the Federal courts, and State laws or proceedings under them cannot deprive him of that right. *Ibid.*

4. A dissenting part owner is entitled to a stipulation to secure his interest in case of a loss on a voyage undertaken against his wishes. *Tunno et al. vs. The Betsina*, - - - - - 406
5. The court of admiralty will not order an account as a separate and independent mode of relief, but only as incident to other matter of which it has admitted cognizance. *Ibid.*
6. In the management of a vessel the opinion of the majority shall prevail, unless it forbids its employment, in which case it yields to the minority who desire its employment, because the public interest must be protected in securing employment to the vessel. *Ibid.*
7. The court of admiralty has an admitted jurisdiction to secure the value of the dissentient minority's interest, in case of a disagreement among part owners in the employment of the vessel. *Ibid.*
8. The Admiralty has jurisdiction over marine torts, which may be defined to be unlawful acts, injurious to others, independent of contract, happening or being committed upon the sea or tide-water. *The Philadelphia and Havre De Grace Steam Tow-Boat Company vs. The Philadelphia, Wilmington and Baltimore Railroad Company*, - - - - - 280
9. A steam-tug, regularly licensed under the Acts of Congress, plying between ports in different States, is within the provision of the constitution as to the regulation of commerce, and the observance of the special State laws regulating Sunday labor, is not compulsory upon such steam-tug; but it would have been otherwise had the tug been engaged in towing vessels between ports of the same State. *Ibid.*
10. Where the respondents had contracted with certain parties for the building of a bridge across the Susquehanna river, and the bridge contractors, at the request and for the convenience of the respondents' engineers, had driven in the bed of the river a "sight-pile," upon which a steam tug-boat ran, without fault on her part, and was thereby much damaged, *held*, that the negligence of the contractors and engineers, in not removing the "sight-pile," was the negligence of the respondents, the relation of master and servant being established by the facts. *Ibid.*

AGENT.

See Master and Servant.

AGREEMENT.

1. A person may make an agreement, which will bind him legally, to make a particular disposition of his property by last will. *Johnson vs. Hubbell et al*, - - - - - 177
2. A court of equity will decree the specific performance of such an agreement upon the principles which govern the court, in the exercise of this branch of its jurisdiction. *Ibid.*
3. Although the agreement is by parol, if there is a part performance of such a character as, upon the principles recognized by the court, will take a parol agreement out of the statute of frauds, then there is nothing peculiar about an agreement of this kind to exclude it from the operation of those principles. *Ibid.*
4. If one party to a parol agreement has wholly or partially performed it on his part, so that its non-fulfilment by the other party is a fraud, the court will compel a performance. *Ibid.*
5. Although a party has a right to the protection of the court, if that protection cannot be given him without invading the rights of innocent parties, its aid will be refused. *Ibid.*

ALTERATION.

See Lien.

ARREST.

See Public Officers.

ARTIFICIAL WATER COURSE.

See Riparian Owner.

ASSIGNMENT.

See Fraudulent Conveyance.

1. Two partners cannot make an assignment of all the partnership property and effects of an insolvent firm, to a trustee with preferences, after the third partner has refused to secure any one of the creditors in preference to others, or to distinguish between them, and in his absence, not out of the country, but where he might be again consulted without unnecessary delay. *Henry C. Bowen vs. Henry O. Clark and others*, - 203

2. The third partner repudiated the assignment, and he, with the aid of his co-partners and a mortgagee of a portion of his property, who was also a preferred creditor, took the assigned property from the assignee, who refused to sue at law for the property, or its value, unless indemnified against costs and expenses. *Held*, that a court of equity should not entertain a bill against all the partners and the mortgagee, to restore the original property to the assignee's firm on account, at the suit of two of the preferred creditors, one of whom had been refused a preference by the non-assigning partner. *Ibid*.

3. When the principal assigning partner was laboring under the immediate effects of intoxication, which he had just slept off, at the time of the execution of the assignment, with the full knowledge of the agent of the plaintiff who procured the assignment, and of the assignee; if the circumstance is not sufficient to fix upon the transaction the imputation of fraud, it is suspicious, and should not be favored in a court of equity. *Ibid*.

4. A mortgage of a retail store, with possession and a power of disposition reserved to the mortgagor, either in the mortgage or in any other manner, is to be considered a means of hindering or delaying creditors, and void as against executions or attachments. But a court of equity will not entertain a bill, at the suit of preference creditors under an assignment, to avoid a mortgage on this ground against the mortgagors and the mortgagee, who is also a preferred creditor equal with the plaintiffs, unless there is a deficit of assets, and payment of the debt secured by the mortgage is claimed in full. *Ibid*.

5. A partial assignment of a debt, not assented to by the debtor, will not bind the latter at law or in equity, nor deprive him of the right to pay the whole to the assignor, even after notice. *Fairgrievs vs. The Lehigh Navigation Company*, - 161

6. The salary of a clerk is not assignable before it is earned, in whole or in part. *Ibid*.

7. Whether a debtor who has made a fraudulent conveyance can afterwards assign the property so conveyed, to be applied to the payment of his debts, or not? *Hooper, Son & Co. vs. Rosenthal*, - 46

8. Is there any difference between the conveyance of such property to others in trust for the payment of debts, and a conveyance directly to the creditors themselves? *Ibid*.

9. A conveyance of property of every kind whatsoever in trust for the payment of debts will include property previously conveyed to defraud creditors, unless it is held adversely by the fraudulent vendee. *Ibid*.

10. The British doctrine with regard to assignments for the benefit of creditors and the American doctrine discussed. *Ibid*.

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See Stoppage in transitu.

ATTESTATION.

See Judgment.

ATTORNEY:

See Account.

AUTHENTICATION.

See Judgment.

AUTHORITY.

See Claims.

BANKS.

See Check.

BILLS OF LADING.

See Lien.

1. A merchant loaded a Spanish vessel at C., chartered to deliver the cargo in London. The vessel put into an intermediate port disabled; whereupon the captain, without any communication with the merchant or his agents at that port, though aware of their existence, entered into a charter party with the captain of another vessel to take the cargo to its destination, which the charter party described to be 470 tons, the captain of the disabled vessel agreeing to load the other and pay freight at a rate per ton exceeding the rate of freight for which the first vessel was chartered. The vessel was loaded, and a bill of lading in accordance with the terms of the charter party was signed by the captain of the second vessel. On the arrival of the cargo at its destination it was discovered to be only 844 tons, and the merchant offered to pay freight on that amount at the rate agreed on by the charter party, which having been refused, he paid for 470 tons under protest, and brought an action for money had and received to recover the difference:—Held,

1. First, that the merchant was entitled to recover.

2. Secondly, that the master had no authority to bind the merchant to pay the freight mentioned in the bill of lading.

3. Thirdly, that the merchant was not liable in an action upon the charter party for the neglect to provide a full cargo.

4. Fourthly, that the representation in the charter party that the cargo amounted to 470 tons did not amount to a warranty.

5. Fifthly, supposing that representation had been a false and fraudulent one, the merchant would not be accountable for it. *Gibbs and others vs. Gray and others*—Gray and others *vs.* Gibbs and others. - 738

BOUNDARY OF LANDS.

Lands bounded on Lake Champlain extend to the edge of the water at low water mark. The same rule applied, in this case, to lands near the lake bounded on a creek emptying into, and the waters of which ordinarily maintain the same level, and rise and fall with those of the lake; there being no claim made that the boundary should extend to the centre of the creek. *Judson B. Fletcher vs. Samuel Phelps and Benajah Phelps.* 677

CARE.

See Master and Servant.

CARRIERS.

1. Where A makes a contract in the form of a bill of lading, in which B, the ship-owner, undertakes to send forward A's goods by a particular ship at a particular time, the shipper is entitled to have the very contract made fulfilled, and if B, the ship-owner, substitutes another ship instead of the one stipulated for, he has substituted different risks, and will be

held as an insurer against all loss from whatsoever cause. *Bazin vs. The Liverpool and Philadelphia Steamship Company.* - - - 459

2. The rule by which damages are to be assessed against a carrier, where the shipper's goods are lost through his ignorance or want of care and skill, is their net value at the port of delivery. The carrier is not liable for any speculation or possible profits, which the owner might have anticipated in his peculiar business. *Ibid.*

CASES AFFIRMED.

<i>Barto vs. Himrod</i> , 4 Seld. 488.	
See <i>Clark vs. Rochester</i> ,	289
<i>Bayard vs. Hoffman</i> , 4 Johns. Ch. 450.	
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<i>Bayard vs. Shunk</i> , 1 Watts and Serg. 95.	
See <i>McIntire vs. Kennedy</i> ,	428
<i>Dunlap vs. Bournouville</i> , 26 Penn. St. Rep. 72.	
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See <i>Ibid.</i> ,	620

CESTUI QUE TRUST.

1. Where one W., the defendant, and one M., the complainant, entered into a contract and agreement whereby the said W. became the agent and trustee of the said M., to sell his interest in the steamboat *Jewess*, under certain terms and upon certain stipulations; and where, in direct violation of the terms of the contract, co-operating and conspiring with one H., who also owned a moiety of the steamboat, the said W. sold to R., his partner, the interest of his cestui que trust, and advanced part of the purchase money, the sale being made at a lower price than had been previously offered, and within thirty days of the sale, took, by the Custom House documents, title and possession to himself of a certain interest in the said steamboat, the sale was held void, as being in violation of the general and universally established doctrine, that trustees are incapable of purchasing trust property themselves. *Montgomery vs. Whittington, Hooper, Ricketts and Murphy.* - - - 344

2. The general doctrine of the relations between cestuis que trust and trustees discussed. *Ibid.*

3. The cestui que trust is entitled to the full value of the property at the time of the sale, as damages, if it is lost or not in a condition to be returned. *Ibid.*

CHECK.

1. Where A, the debtor, paid to B, the creditor, two checks, one his own, and one that of a third party, the mere taking of the checks for a pre-existing debt, and without any express agreement that they should be payment, does not make them payment; and A is liable to B for the second check, if worthless or unpaid, although it is the check of a stranger and A's name does not appear upon it. *McIntyre vs. Kennedy, Childs & Co.* 433

2. It is a general rule that if one indebted to another by simple contract gives his creditor a promissory note or check drawn by himself for the same amount, without any new consideration, the check or note shall not be deemed a satisfaction of the original debt, unless so intended and accepted by the parties. *Ibid.*

3. Whether a debtor pays out his note or check, or the note or check of a third party, the creditor, in the absence of any special agreement, may resort to his debtor if the check or note is unpaid. *Ibid.*

4. Where a check in the usual form, payable to bearer, is drawn by B. on the E. Bank, and passes into the hands and ownership of the N. Bank, the latter bank, the holder, cannot maintain an action in its own name against the former bank, the drawee, the check never having been accepted by the drawee, but its payment refused. Per HUNTINGTON, J.; ABBOTT, J., dissenting. *National Bank vs. Eliot Bank.* - - 711
5. But where the third party, seeking to enforce the contract, is particularly designated in the contract, he may maintain an action in his own name for a breach of the undertaking. *Ibid.*
6. The contract between a bank and its customer in deposits is in the nature of a loan, and the relation that of debtor and creditor. *Ibid.*
7. A check, in order to avail the holder, must be presented, accepted, and charged. *Ibid.*

CIVIL GOVERNMENT.

- See *The Madison and Indiana Railroad vs. Whiteneck,* - - 214

CLAIMS.

1. The act of Congress of the 3d of March, 1797, provides, that in a suit by the United States to recover a balance due on the books of the Treasury Department, the defendant cannot give in evidence as a set-off, a claim against the government, which has not previously been presented to, and disallowed by the proper accounting officer, without proving that it was not before in his power to produce the voucher for such claim, and that he was prevented from exhibiting it, "by absence from the United States, or some unavoidable accident." *The United States vs. Charles K. Smith.* 268
2. The rejection of an account or claim against the United States, by an accounting officer of the government, authorized by a special act of Congress to adjust the same on equitable principles, does not preclude the defendant, when sued, from setting up such rejected claim or account, as a set-off. *Ibid.*
3. There is no authority, either in the executive or judicial department of the government, to allow a claim against the United States, which is prohibited by law. *Ibid.*
4. The legislation of Congress prohibits any extra compensation to an officer, for services performed, properly pertaining by law, to his office. *Ibid.*
5. The defendant, as Secretary of Minnesota Territory, having a fixed salary as such, was not entitled to claim in addition thereto, the salary of governor, during the absence of that officer; as the act organizing the Territory made it the duty of the secretary, "in case of the death, removal, resignation, or necessary absence of the governor," to discharge the duties of that office, without any provision for an increase of compensation to the secretary. *Ibid.*
6. The proviso in the 2d section of the act of September 30, 1850, expressly prohibits the allowance of double salaries in all cases. *Ibid.*
7. The act organizing the Territory of Minnesota, made the Secretary the disbursing officer of the territorial government, and he cannot claim a commission on such disbursements. *Ibid.*
8. Where an officer, with a salary payable quarterly, is appointed for four years, "unless sooner removed by the President," and a removal is made during a current quarter, he is not entitled to his salary to the end of the quarter. *Ibid.*
9. By the organic act of Minnesota Territory, the general government became pledged to defray "the expenses of the legislative assembly, the printing of the laws, and other incidental expenses;" and the defendant is entitled to a credit for services rendered, or expenditures made, within the fair scope and meaning of these terms, so far as they did not pertain to the office of secretary of the territory; but the words "other incidental

expenses," must be restricted to such expenses as were incidental to the legislative assembly and the printing of the laws. *Ibid.*

10. The 2d section of the act of 29th of August, 1842, which applies to territories then, or afterwards to be organized, provides that no act of the legislature of a Territory shall be deemed of sufficient authority for a payment by the national treasury, and requires proper vouchers and proof of the same, to be exhibited to the accounting officers of the proper department. *Ibid.*

11. In a judicial case involving the accounts of a former secretary of a territory, in which credits are claimed, which have been rejected by the treasury department, the fact that such credits have not been embraced in the estimate required by the organic act of the territory to be previously made by the secretary of the treasury, does not preclude their allowance by a jury, if not objectionable on other grounds. *Ibid.*

COLLISION.

1. When two vessels are approaching each other, and the character and course of either cannot be determined by the watch on board, such vessel should be stopped, or slowed, until the course of the approaching vessel be ascertained, whether it be a sail or a steam vessel. *Eben B. Ward, et al., vs. Philo Chamberlain, et al.*

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2. Some of the rules of the Trinity masters, intended to apply in navigating a river, when applied to the open sea, are more likely to produce collisions than to avoid them. *Ibid.*

3. In certain conditions, one vessel is to keep her course, and the other to avoid her; how can a concurrence of judgment as to their position, by their respective masters, be expected, so as to comply with the rule of right, when the wind is fresh? Uncertainty in this respect produces many collisions. *Ibid.*

4. All the rules of navigation should be simple and easily understood. *Ibid.*

5. Complicated rules are often misunderstood, and more frequently applied to facts supposed, which have no existence. *Ibid.*

6. So far as my limited experience on this subject enables me to speak, the rules of navigation recognized, instead of insuring safety, have greatly increased the number of collisions. *Per McLean, J. Ibid.*

7. If the rule were, that all vessels meeting each other should turn to the right, all would understand it, and collisions would be avoided. Each vessel, in such case, would know the course of the other; and if either could not turn as directed, would not run in the path of the other. I am aware that this is too simple and too easily understood for technical lawyers, on the bench or at the bar. It is the rule on every turnpike road, and such maxims are always founded on common sense. *Per McLean, J. Ibid.*

8. When fault may be attributed to two vessels, the damages are divided, and not apportioned according to the degree of fault. *Ibid.*

COMPROMISE.

1. The law will permit a compromise of any offence though made the subject of a criminal prosecution, for which offence the injured party might recover damages in an action, but if the offence is of a public nature, no agreement can be valid that is founded on the consideration of stifling a prosecution for it. *Bowen & McNamee vs. Addison Buck and David Warren.*

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2. Therefore, where the plaintiff's agent induced the giving of the note on which this action is brought by representing that a prosecution had been instituted, and by agreeing to settle and stop that prosecution, the use made of this alleged proposition to compel the giving of the note, renders the contract void. *Ibid.*

CONGRESS.

See Claims.

CONSTITUTIONAL LAW.

1. Where the city of Rochester had become subscribers to the capital stock of a railroad, under a special act of Assembly, *held*, that the contract was void, as being in violation of the Constitution of New York, the rights of eminent domain and taxation considered. *Freeman Clarke vs. the city of Rochester*, - - - - - 289

2. The power to tax property in aid of a private corporation, or for the purchase of its stock, is not among the ordinary powers of a municipal government, and requires special legislation to confer it, and this legislation is, in New York, prohibited by the constitution. *Per Allen, J. Ibid.*

3. A State Legislature, in the absence of any express constitutional authority, has no power to sell, surrender, alienate, or abridge any of the rights of sovereignty, such as the right of taxation, so as to bind future legislatures; and any contract to that effect is void. *Henry S. Mott et al., Canal Commissioners, vs. the Pennsylvania Railroad Company et al.*, 623

4. So much of the act of the Legislature of Pennsylvania, passed May 16, 1867, authorizing the sale of the Main Line of the Public Improvements of that State as provides "that if the Pennsylvania Railroad Company shall become the purchaser, they shall pay, in addition to the purchase money at which it (the Main Line) may be struck down, the sum of \$1,500,000, in consideration whereof the said Railroad Company and the Harrisburg Railroad Company shall be discharged by the Commonwealth forever" from the payment of all tonnage taxes, and all other taxes whatever, "except for school, city, county, borough and township purposes," declared unconstitutional and void, and an injunction granted to prevent the same from forming part of the terms of the sale. *Ibid.*

5. The act in question provided that the sale should be made by the Governor; *held*, that as this was not part of his official duty as the Executive of the State, but merely ministerial, the injunction might issue against him. *Ibid.*

6. The holders of the State loan, whether or not having a specified lien on the tolls of the public works, have no right to object to a sale thereof by the State. *Ibid.*

7. The courts cannot annul an act of the Legislature simply because it violates the fundamental principle of *correct* legislation, but may because it violates the fundamental principles of the Constitution. *Hudson and Ind. R. R. Co. vs. Whiteneck*, - - - - - 214

8. A law may be constitutional in part and unconstitutional in part, hence, a law which enacts that railroads shall fence, as to that provision is a reasonable regulation, but where it inflicts a penalty upon an appeal, it is unconstitutional and void. *Ibid.*

9. The present constitution of New Jersey limits the powers of the Legislature, and separates them from those of the judiciary, and adopts the prohibitions of the Constitution of the United States against laws impairing the obligation of contracts, and further prohibits the depriving a party of any remedy for enforcing a contract which existed when the contract was made. Hence, where the Legislature passed an act for the relief of the creditors of a manufacturing corporation, providing that certain persons should be authorized to sell all property mortgaged for the payment of bonds, at public sale to the highest bidder, *free from all incumbrances*, and, after paying certain expenses and costs, to distribute the proceeds to the corporation's creditors according to the priority of their several liens, it was *held* that such legislation was unconstitutional by reason of its impairing the obligation of the contract between the mortgagors and the

mortgagees, and depriving the mortgagees of a remedy which existed at the time the contract was made. *John M. Martin vs. the Somerville Water Power Company*, - - - - - 400

CONTRACT.

See Bill of Lading. Check. Evidence.

CONVEYANCE.

See Assignment.

CRIMINAL OFFENCE.

See Jurisdiction.

CUSTOM.

See Evidence.

DAMAGES.

See Carrier. Cestui que trust. Riparian Owner.

DELAWARE RIVER.

See Jurisdiction. Mandamus.

DELIVERY.

See Personal Property. Stoppage in transitu.
See Admiralty.

DEPOSITOR.

See Check.

DISSENTING PART OWNER.

See Admiralty.

ENROLMENT.

See Lien.

EVIDENCE.

See Lien. Seduction.

1. The common law of England, as changed and modified by our statutes, is part and parcel of the law of Alabama, so far as applicable to her institutions and government. *Barlow vs. Lambert*, - - - - - 171

2. Evidence of a local custom is admissible, to supply details in a contract, either oral or written, as to which the contract itself is silent; or to show that provincialism, and technicalities of science and commerce, have acquired a known, fixed, and definite meaning, different from their ordinary import; or where such technicalities, unexplained, are susceptible of two or more reasonable constructions; but it cannot be received to contravene any positive requirement of the law, any principle of public policy, or an express contract, whether oral or written, nor to give to plain and unambiguous words or phrases a meaning different from their natural import; and it is, therefore, inadmissible to show that a stipulation in a contract of hiring, that the hirer was to "lose the negro's lost time," "related to time lost by sickness or running away, and not to time lost in consequence of the negro's death." *Ibid.*

3. If evidence is offered as a whole, when a portion of it is illegal, the court may, on objection, exclude the whole of it. *Ibid.*

4. When a party calls for a part that was said at an interview of the parties, it does not follow that the other party may show all that was said.

He may show so much of the conversation as made a part of the negotiations, or a part of the *res gestae*. *Isaac H. Brown vs. Jacob Goldsmith et al.* - - - - - 804

5. The court will not grant a new trial, even if the ruling of the judge was wrong, if upon the whole case justice has been done. *Ibid.*

6. The character of the deceased as a violent, turbulent, blood-thirsty man, when it qualifies, explains, and gives point and meaning to his conduct, and tends to produce in the mind of the slayer a reasonable belief of imminent danger, is admissible evidence for the defendant; and there are cases, also, in which it may be looked to, in determining the amount of provocation, and thus fixing the degree of the homicide; but the evidence in this case does not justify its admission on either of these grounds. *Franklin vs. the State*, - - - - - 722

7. The violent character of the deceased cannot be established by proof of isolated facts. *Ibid.*

8. T. & M., brokers, employed by H., sold on his account to D., M. & Co., who were also brokers, ten tons of linseed oil. On the 14th of August, 1855, the following sold note was sent by T. & M. to H.

"Sold to Dale, Morgan & Co., for account of Mr. Charles Humfrey, ten tons of linseed oil, of merchantable quality, at, &c., (stating the terms.)

"THOMAS & MOORE, Brokers.

"Quarter per cent. brokerage to D., M. & Co., and a half to us."

On the same day the following bought note was sent by D., M. & Co. to T. & M:

"Sold this day, for Messrs. Thomas & Moore, to our principals, ten tons of linseed oil, of merchantable quality, at, &c., (stating the same terms.)

"DALE, MORGAN, & Co., Brokers.

"Quarter per cent. to D., M. & Co."

D. M. & Co., afterwards declined to accept the oil; and on the 28th of February, 1856, they informed H. of the name of their principal for whom they had purchased.

H. afterwards brought an action against D., M. & Co. for the price of the oil, and at the trial parol evidence was admitted of a usage of trade in the city of London, by which a broker making a contract was held personally liable as purchaser, if he did not at the time of the contract disclose the name of his principal: Held, first, that there was clear evidence of a contract of bargain and sale between the plaintiff as seller and the undisclosed principal of the defendants. *Humfrey vs. Dale*, - - - - - 551

9. Secondly that the evidence of the usage of trade, whether treated as explaining the language of the written contract, or adding to it a tacitly implied incident, was properly admissible, and rendered the defendants themselves liable under the contract. *Ibid.*

10. The mother of a child born in wedlock, but begotten before, is not a competent witness to prove that the child was not begotten by the man who became her husband before its birth, in the absence of evidence of non-access. *Page vs. Dennison*, - - - - - 469

11. Where no evidence of non-access at the time of conception was given, the declarations and acts of the husband and wife at the birth of the child, and subsequently, were inadmissible to prove it illegitimate. *Ibid.*

[Per LOWRY, J., dissenting—

1. In an inheritance case, where the claimant was begotten before and born after marriage, the mother is a competent witness to prove that her deceased husband, whose estate is the subject of the claim, was not the father of the claimant. *Ibid.*

2. Where a child was begotten before and born after marriage, and at the time of its birth both the mother and her husband denied that it was

his child, and it was, within a few days, sent away from his house and reared by its maternal grandfather, and never admitted into the family of the husband, nor reputed as his child, this is evidence, in an inheritance case, that the child is illegitimate. *Ibid.*]

3. Presumption on the subject of legitimacy examined historically and on principle. *Ibid.*

12. A verbal agreement, to be effectual as a *waiver*, *variation*, or *change* in the stipulations of a prior written contract between the parties, must rest upon some new and distinct legal consideration, or must have been so far executed and acted upon by the parties that a refusal to carry it out would operate as a fraud upon one of the parties. *Reuben H. Thurston and Thomas Hays vs. William Ludwig*, - - - 606

13. On a motion for an injunction new matter set up by way of evidence in the answer responsive to the bill, is to be deemed evidence in favor of the defendant, as his sworn statement. *James Tobin et al. vs. Robert Walkinshaw et al.* - - - 106

EQUITY.

See Agreement.

The fixed rule in equity is, that where the rights of a person not before the court will be affected by the decree asked, the court will not make it; but the general rule is to be applied to each case as it arises, by the aid of precedent cases. *Ibid.*

FAULT.

See Collision.

FORFEIT.

See Pledge.

GUARDIAN.

See Attorney.

An infant of the age of ten years was brought up on habeas corpus upon the application of the mother who was surviving parent, the father, who was a marine, having died without appointing a guardian. The object of the mother, who was a Roman Catholic, was to remove the infant from a school under the Commissioners of the Royal Patriotic Fund, at which she had placed her in 1855, and to have her educated in a Roman Catholic school. *Held*, that the mother, as guardian for nurture, was entitled to the custody of the person of the child; that the court could not examine the infant as to her wishes or religious belief; that the mother was not bound to educate her in the Protestant faith, nor had she lost her right over her by committing her to the care of the Commissioners of the Royal Patriotic Fund; and therefore the court was bound to order her to be delivered to her mother. *Reg. vs. Maria Clarke in re Alicia Race*. - - 587

HABEAS CORPUS.

See Judgment.

1. A return to a writ of *habeas corpus* issued by a judge of the United States, under the judiciary act of 1789, showing an imprisonment under process, legal and valid on its face, is conclusive, and precludes further inquiry into the cause of imprisonment. *Ex Parte Sifford, marshal et al.* 650

2. But the seventh section of the Act of Congress of the 2d of March, 1838, expressly confers on a judge of the United States, the power to issue the writ of *habeas corpus*, in all cases of imprisonment by any authority of law, for any act done or omitted, in obedience to a law of the United States; and where such imprisonment is for an alleged violation of a State law, and by State authority, the judge or court issuing the *habeas corpus*

may inquire into the circumstances under which the alleged crime was committed, with a view to the question whether the act complained of was done or omitted in the proper discharge of official duty, and under the authority of the United States: and, if it appears the act was so done or omitted, the judge or court is authorized to discharge the party from such imprisonment. *Ibid.*

3. A marshal having a person in custody under lawful process, is bound to retain such custody, and in so doing may use such force as is necessary; and in the proper use of such force, is not guilty of a crime against the law of the State in which the transaction occurred. *Ibid.*

4. A State judge has no jurisdiction to issue a *habeas corpus* for a prisoner in the lawful custody of an officer of the United States, with the knowledge that he is so held; and if, on the return of the writ, it appears the imprisoned party is held by an officer of the United States under legal process, the jurisdiction of the State judge ceases, and all further proceedings by him will be *coram non judice*. *Ibid.*

5. A sheriff, or other State officer, having a so-called writ of *habeas corpus*, under the Ohio statute of 1856, and having knowledge that the prisoner named in the writ is in the custody of an officer of the United States, under legal process, is under no obligation to serve or attempt to serve such writ; and his return of the facts is a sufficient justification for not serving it. *Ibid.*

6. A marshal, having custody of a prisoner under the authority of the United States, is not bound to surrender such prisoner upon the demand of a State officer, having a writ issued under the said Ohio statute, requiring him to take the prisoner from such custody. *Ibid.*

7. But if the *habeas corpus* in the hands of the State officer is issued in good faith, and is the well known writ of that name, requiring the officer of the United States having the custody to bring the prisoner before the judge or court issuing the writ, with the cause of the caption and detention, it is the duty of such officer to obey such writ, as thereby he does not part with the custody of the prisoner; and such obedience will not be in conflict with his duty. *Ibid.*

8. It is well settled by the adjudications, both of the courts of the Union and the States, that, in case of concurrent jurisdiction, the tribunal or court to which jurisdiction first attaches shall retain it; and neither has a right to interfere with the other. *Ibid.*

HIGH WATER MARK.

See Riparian Owner.

MOMICIDE.

See Evidence.

ILLEGITIMACY.

See Evidence.

IMPROVEMENT.

See Negligence.

INSOLVENT.

See Stoppage in transitu.

INTOXICATION.

See Assignment.

JUDGMENT.

See Lien.

1. The record of a judgment obtained in a Probate Court of Ohio in a

proceeding upon habeas corpus, is within the provisions of the Act of Congress of 26th May, 1790, providing for the authentication of records from sister States. The State of Ohio ex rel. Walter Hinchman (a minor) by his next friend, David H. Taylor *vs.* Morgan Hinchman. - - 424

2. In an action brought in Pennsylvania upon a judgment, certified under said act as a decision of the Supreme Court of the United States, the courts of this State are bound to take notice of the local laws of the sister State, in the same manner as that court would do on a writ of error to the Supreme Court of this State. *Ibid.*

3. The act of Congress does not forbid the union of the offices of judge and clerk in the same person; and it is no objection, therefore, to the attestation and certificate of a record from a sister State, that they are both given by the same person, where the laws of that sister State provide for such union. *Ibid.*

4. The act of Congress does not preclude any other evidence of the authenticity of a record of a sister State, which the courts of another State may deem competent. *Ibid.*

5. Where the record itself shows that the person giving the certificate must necessarily have been "the judge, chief justice, or presiding magistrate" of the court, it is not material or requisite to the validity of the authentication of a record, under the act of Congress, that the language of the certificate itself should exclude every other supposition. *Ibid.*

JURISDICTION.

See Lien. Habeas Corpus.

1. A State may waive its right to exercise judicial authority over portions of its territory. Commonwealth *vs.* Andrew B Frazee, - 167

2. By the agreement between the States of Pennsylvania and New Jersey made in 1788, the juridical investigation and determination of criminal offences committed on the river Delaware are specially provided for, and is exclusive, no other court having cognizance of such offences except as provided by this agreement and subsequent Acts of Assembly. *Ibid.*

3. A defendant cannot be called upon to answer two different tribunals for the same offence. *Ibid.*

JURY.

1. The separation of the jury, for a short time, while considering of their verdict, is a matter to be considered by the court on motion for a new trial, but is not a proper ground for a motion in arrest of judgment. Franklin *vs.* The State, - - - - 722

2. The right of trial by jury may be waived, and such waiver will be valid. The Madison and Indianapolis Railroad Company *vs.* Whiteneck. 214

LEGITIMACY.

See Evidence.

LIEN.

See Admiralty.

1. Where a shipper consigns goods to a factor and endorses and sends forward bills of lading for them, and upon the faith of such bills of lading the factor makes advances: Held, that the facts constituted such a symbolical delivery of the goods to the factor or consignee as to amount to a constructive possession, and that the factor's lien attached. Davies & Aubin *vs.* John Bradley & Co. - - - - 282

2. A maritime lien on a vessel is paramount to a domestic lien, under a statute of a State, of subsequent date. And if a judgment and sale take

- place under a statutory lien, it will not displace or affect the prior lien. Daniel O'Callaghan, claimant, *vs.* Joseph Riggs, - - - 139
3. The vessel in the hands of such purchaser is subject to the prior lien. *Ibid.*
4. As the liens set up are distinct, the plaintiffs being different, neither of these suits can be pleaded in abatement to the other. *Ibid.*
5. The purchaser, under the statute lien, could not object to the jurisdiction of the admiralty court, as the suits and rights of the parties are distinct. *Ibid.*
6. It is settled that there can be no lien by the general maritime law for materials and supplies furnished a vessel in her home port. Hill & Conn *vs.* the Golden Gate, - - - - - 142
7. The question whether a vessel is a foreign or domestic one depends not on her enrolment, but upon the residence of her owners. *Ibid.*
8. Where there is a charter party, the charterers having exclusive control of the vessel, will be deemed the owners, and alone are responsible for damages and contracts. *Ibid.*
9. When the plan of a building is changed and greatly enlarged while it is in the course of construction, the liens of mechanics and material men subsequent to such change relate only to the commencement of the alteration on the ground, and are subject to all liens which then had fastened on the land. Smedley *vs.* Conway, - - - - - 442
10. In the distribution of the proceeds of a sheriff's sale, a judgment in a scire facias on a mechanic's claim is not prima facie evidence in a contest with other lien claimants. *Ibid.*

MANDAMUS.-

1. It is settled that the writ of mandamus issues only where a ministerial act is to be done, and there is no other specific remedy. It is granted only at the discretion of the court to whom application is made. Tatham *vs.* the Wardens of Philadelphia, - - - - - 878
2. By the act of 1851, the Board of Wardens, on application of the owners of lands on the Delaware, within the limits of Philadelphia, is bound to cause to be defined, at the expense of the applicant, the line of low-water mark bounding their jurisdiction, nor has this duty been affected by the consolidation act. *Ibid.*
3. Windmill island, in the river Delaware, opposite the city of Philadelphia, is within the jurisdiction of the port wardens.

MARITIME LAW.

See Lien.

MARSHAL.

See Habeas Corpus.

MASTER AND SERVANT.

1. Where an injury happens to a servant while in the actual use of an instrument, engine or machine, in the course of his employment, of the nature of which he is as much aware as his master, and the use of which is, therefore, the proximate cause of the injury, he cannot, at all events if the evidence is consistent with his own negligence in the use of it being the real cause, nor in case of his dying from the injury can his representative, under Lord Campbell's act 9 & 10 Vict. c. 93, recover against his master, there being no evidence that the injury arose through the personal negligence of the master. Nor is it any evidence of such personal negligence of the master that he has in use in his works an engine or machine less safe than some other which is in general use. Dynen *vs.* Leach, 745
2. Therefore, where a laborer was killed through the fall of a weight which he was raising by means of an engine to which he attached it by

fastening on to it a clip, and the clip had slipped off it, it was held that there was no case to go to the jury in an action by his representative against the master, although it appeared that another and safer mode of raising the weights was usual, and had been discarded by the orders of the defendant. *Ibid.*

3. The defendant, a master builder, being engaged to repair a house, employed one of his workmen, A., to erect the scaffolding for that purpose. A. knew how to build scaffoldings. The materials which were supplied to him by the defendant were in bad condition. The workman broke several of the putlogs, (the pieces of wood between the wall and the upright poles), but was ordered by the defendant not to break any more, as they would do very well. The scaffolding having been erected by A. of the materials which were furnished to him, an accident happened to another workman, B., in consequence of the bad condition of the putlogs: Held, in an action by B. to recover compensation for the injuries received, that there was evidence to go to the jury in support of the plaintiff's case, and that such evidence ought to have been left to the jury. *Roberts vs. Smith and another,* - - - - - 750

4. A master is bound to exercise proper care and diligence in the selection of the agencies and instruments with or upon which he employs his servants; and, if he fails to do so, he will be liable to the servant for any injuries he may sustain therefrom. *Russell T. Noyes vs. John Smith and William R. Lee,* - - - - - 615

5. The declaration averred that the plaintiff was hired by the defendants to have the charge of and conduct, and run an engine, and that, by virtue of said employment, it became the duty of defendants to furnish an engine that was well constructed and safe, &c., but that they carelessly and wrongfully furnished an insufficient engine; that the insufficiency was unknown to the plaintiff, and "but for want of all proper care and diligence, would have been known to the defendants;" and that, while the plaintiff was in the careful and prudent use of said engine, it exploded on account of said insufficiency, and injured the plaintiff, &c. *Held,* on demurrer, that the declaration disclosed a sufficient cause of action. *Ibid.*

MATERIAL MAN.

See Admiralty.

MATERIAL.

See Lien.

MECHANICS' LIEN.

See Lien.

MINNESOTA.

See Claims.

MISSISSIPPI RIVER.

See Riparian Owner.

MONEY HAD AND RECEIVED.

See Bill of Lading.

MORTGAGE.

See Assignment. Pledge.

MURDER.

See Evidence.

NAVIGATION.

See Riparian Owner.

NEGLIGENCE.

See Master and Servant.

1. A person who came voluntarily to assist the servants of a railway company, doing some work on the railway, was accidentally killed by the negligence of some other servants of the company. The railway company not having authorized the negligence, and the servants being persons of ordinary skill and care for the work,—*Held*,

First, that no action lay against the company by the personal representative of the deceased under the 9 & 10 Vict. c. 93, and,

2. *Secondly*, that the above facts constituted a defence under the plea of not guilty. *Degg vs. The Midland Railway Company*, - - - 500

8. Negligence is a mixed question of law and fact. *William P. Briggs vs. S. W. Taylor*, - - - 239

4. A judge is not bound to submit to a jury questions of fact which uniformly result from the course of nature; this uniformity of nature becomes a rule of law. *Ibid*.

5. Meaning of the phrases, "ordinary care" and "gross negligence." Authorities cited and discussed. *Ibid*.

6. Any injury to property in custody of an officer under attachment, caused by his apparent negligence or want of care, renders him prima facie liable, and imposes upon him the burden of showing a valid excuse. *Ibid*.

7. The liability of railroad companies for damage caused by fire through the negligent management of their engines, is settled at common law. *Sunbury and Erie Railroad Company vs. Hummel*, - - - 244

8. But, they cannot be called upon to make compensation in advance for the risk of fires not included within the common law rule, and no such considerations can operate upon the viewers in fixing the amount of damages to be awarded to the land-owner. *Ibid*.

9. The Legislature, in requiring the viewers to take into consideration the advantages and disadvantages resulting from any public improvement, as a railroad, did not authorize them to enter into remote and contingent future and speculative damage; full compensation according to the best estimates that can be obtained, would seem to be the true rule. *Ibid*.

NEW JERSEY.

See Contract. Jurisdiction.

NEW TRIAL.

The action of the primary court on a motion for a new trial is not reversible in the appellate court. *Franklin vs. The State*, - - - 722

NON ACCESS.

See Evidence.

NON PAYMENT.

See Pledge.

NOTE.

See Evidence.

OFFENCE.

See Jurisdiction.

OFFICER.

See Negligence.

ORDINARY SKILL.

See Negligence.

PAROL AGREEMENT.

See Agreement.

PAWNEE.

See Personal Property.

PENNSYLVANIA.

See Jurisdiction.

PERSONAL PROPERTY.

1. To render a transfer of personal property valid against creditors, it was formerly held that there must be an immediate, open and exclusive possession on the part of the transferee; but according to the more recent authorities the character of the sale may be investigated as a matter of fact, and its honesty and fairness determined by a jury. *Leech vs. Shantz*, 620

2. The plaintiffs, the owners of a large quantity of acid in barrels, employed certain brokers to sell it. The brokers contracted with B for the purchase of part, and gave him an order on the plaintiffs that they should deliver to him or his order a certain number of tons of acid. B sold his interest in this contract to E, who sold it to L. A bought the same of L. falsely representing himself as agent for V, and thereby, on pretence of inspecting the acid, obtained from L, the brokers' orders on the plaintiffs for the quantity. These orders had been endorsed over and passed from one purchaser to another, and when delivered by L to A were endorsed by L specially deliverable to himself. A presented the brokers' orders to the plaintiffs, and stating that he had purchased the acid of L on his own account, though nominally for V, induced the plaintiffs to give him a transfer or delivery order on the wharfinger in whose warehouse the acid was lying, authorizing the transfer into A's name of certain specific casks of acid, amounting to the quantity in the brokers' orders mentioned. The wharfinger thereupon transferred the specified casks of acid into A's name. A immediately borrowed money of the defendant, and pledged the casks of acid with him as a security for the repayment, handing over to the defendant the warrants which he had had made out, by the means of which the defendant obtained possession of the acid:—Held, that, as A obtained the delivery order from the plaintiffs by the false and fraudulent representation that he had purchased acid by a sub-sale from a purchaser from the plaintiffs, there was no privity of contract between the plaintiffs and A, consequently that the latter could not convey a good title in the casks of acid to the defendant, though a bona fide pawnee for value, but that the plaintiffs might recover the acid back from him in trover. *Kingsford and another vs. Merry*, - - - - - 691

PLEDGE.

1. The distinction between a pledge and a mortgage. Where B had given G, the defendant, certain promissory notes and at the same time delivered to him sundry certificates of Illinois State indebtedness, and made an agreement that if the notes were unpaid at maturity, the defendants were authorized to dispose of and sell the same sixty days after the maturity of the notes and apply the proceeds to the credit of B, held, that this was a pledge and not a mortgage. *James M. Lewis vs. John A. Graham and others*, - - - - - 868

2. That on forfeiture for non-payment of the notes, the pledgees were required to demand payment and give notice of the intended sale, before sale of the securities could be made by them, so as to deprive the pledgor of his right to redeem. *Ibid.*

3. That demand and notice would apply only to such securities pledged as were specially set forth in such demand, and that a sale of any pledges without notice would be invalid. *Ibid.*

4. That a special partner may, under the law in New York, purchase securities which are sold by his partners as pledges forfeited for non-payment of notes held by the firm. *Ibid.*

5. An offer to pay notes without any actual tender of the money is sufficient, if such tender would be useless by reason of the defendants having previously sold the securities. *Ibid.*

PRESUMPTION.

See Evidence.

PROFESSIONAL SERVICES.

See Attorney.

PROMISSORY NOTE.

See Check.

PROSECUTION.

See Compromise.

PUBLIC OFFICERS.

1. A public officer, whose duty it is to arrest all persons charged with or suspected of the commission of crime, cannot claim any other or further remuneration for his services, than the fees allowed by law. *John Rea, Plaintiff in Error vs. Nathaniel Smith et al,* - - - - -

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2. Whenever an officer makes an arrest, he is supposed to be acting in his official capacity; and where he performs the duty of sheriff, believing he was acting within the authority derived from law, the court will not allow him to change the relation and assume that of a private individual. *Ibid.*

3. A sheriff, or any other ministerial officer, may arrest fugitives from the justice of any other State of the Union, and detain them for a reasonable time, until the requisition of the Executive can be made. *Ibid.*

4. A reward offered may be apportioned, upon equitable principles, among several parties, as the court may direct. *Ibid.*

PURCHASER.

See Lien.

RAILROAD.

See Negligence.

1. The Board of Directors of a railroad company may make rules and regulations in relation to their business, but they must be reasonable, lawful, and within the limits of their charter. The establishment of certain trains for the exclusive transportation of passengers and their baggage, and other trains exclusively for the carrying of freight, is a reasonable regulation. *Merrihew vs. The Milwaukee and Mississippi Railroad Company,* - - - - -

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2. A person cannot, by merely paying his fare and procuring his ticket, as a passenger, compel a railroad company to carry him daily, together with his trunk or trunks, when such trunk or trunks contain merchandise, money and other valuable matter known as "express matter." *Ibid.*

RECORD.

See Judgment.

REWARD.

See Public Officer.

RIPARIAN OWNER.

See Boundary Lands.

1. A riparian proprietor has the right to use the water which flows by or through his lands, for all ordinary purposes, and for the gratification of natural wants, even though the entire stream is thereby consumed; and also the right to its extraordinary or artificial use, provided it is not thereby forced back on the lands of the proprietor above him, is not unreasonably and injuriously precipitated on the lands of the proprietor below, and is restored without material diminution, before it leaves his lands, to its accustomed channel. *Stein vs. Burden.* - - - - 729
2. If a riparian proprietor diverts the water of a running stream for artificial purposes, in quantities sufficient to affect injuriously the rights of the proprietor below him, and does not restore it to its natural channel, without material diminution, before it reaches the lands of that proprietor, he is liable in damages for the injury; and that the means provided by him for its restoration are rendered inefficient for that purpose, after the water has left his land, by the act or interference of a third person, though it might mitigate the damages, is no excuse for the failure, since the right to divert it is only conditional, and ceases when the water cannot be restored. (*Rice, C. J., dissenting.*) *Ibid.*
3. There are no correlative rights existing between the proprietors of adjoining lands, in reference to the use of the water in the earth, or percolating under its surface. Such water is to be regarded as part of the land itself, to be enjoyed absolutely by the proprietor within whose territory it is; and to it the law governing the use of running streams is inapplicable. *Lewis Chatfield vs. Walter M. Wilson.* - - - - 528
4. An act legal in itself, and which violates no right, cannot be made actionable on account of the motive which induces it. *Ibid.*
5. Although the ebb and flow of the tide was, at common law, the most usual test of navigability, it was not necessarily the only one. *M'Manus vs. Carmichael.* - - - - 598
6. But however this may be, that test is not applicable to the Mississippi river. *Ibid.*
7. The common law consequences of navigability, attach to the legal navigability of the Mississippi. *Ibid.*
8. The term *navigable*, embraces within itself, not merely the idea that the waters could be navigated, but also the idea of publicity, so that saying waters are public, is equivalent, in a legal sense, to saying that they are navigable. *Ibid.*
9. Yet the navigability, in fact, is the leading idea, and is the ground of their publicity. *Ibid.*
10. The ebb and flow of the tide does not, in reality, make the waters navigable, nor has it, in the essence of the thing, anything to do with it. *Ibid.*
11. It is navigability *in fact*, which forms the foundation for navigability *in law*, and from the *fact*, follows the appropriation to public use, and hence its publicity and legal navigability. *Ibid.*
12. The real test of navigability in this country, is ascertained by *use* or by public act or declaration. *Ibid.*
13. The acts and declarations of the United States declare and constitute the Mississippi river a public highway, in the highest and broadest intendment possible. *Ibid.*
14. The rule that a grant is to be construed most strongly against the grantor, does not apply to public grants. *Ibid.*
15. The government being but a trustee for the public, its grants are to be construed strictly. *Ibid.*
16. Grants of land by the United States, by patent, have relation to the survey plats, and field notes. *Ibid.*
17. The common law knows but two lines—the *medium filum aquæ* and high water. If the stream be navigable, the boundary of the adjoining land is the one; if not navigable, the boundary is the other. *Ibid.*
18. By the common law, the riparian proprietor on navigable waters, owns to high-water mark only, and this rule applies to the Mississippi river. *Ibid.*

RUNNING STREAM.

See Riparian Owner.

SALARY.

See Claims.

SALE.

See Evidence.¹

SATISFACTION.

See Check.

SCIRE FACIAS.

See Lien.

SECURITY.

See Pledge.

SEDUCTION.

1. The parent, as such, has no direct remedy at common law for the seduction of a daughter. He has to resort therefor to what has been denominated "but little more than matter of fiction"—the relation of master and servant assumed to exist between parent and child—in order to redress this wrong. Two distinct actions, it is true, are submitted to his option, but both have relation to this hypothesis of loss of service, upon which they are dependent—in the one case, as matter in the aggravation of damages; and, in the other, as the very gist of the action itself. *Marcus C. Parker vs. Rebecca Meek, Sr.*

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2. In the action of trespass *vi et armis* for debauching a daughter, the *gravamen* is the illegal entry of the seducer upon the parent's premises; and the seduction itself, and consequent loss of service, may be averred and proven in aggravation of damages. In an action *on the case* for the same injury, the *gravamen* is the consequential injuries arising from the seduction, in loss of service to the parent. In the first action, it is essential that the daughter, whether of full age or not, should have been upon the parent's premises at the time of the seduction; in the latter, whatever be the age of the daughter, it is immaterial when the wrong was perpetrated, so that she reside with the parent some portion of the time of her pregnancy, or of her lying in. *Ibid.*

3. In actions for seduction, proof of menial services by the daughter to the parent is not necessary. Evidence of the most trifling and valueless acts of service is sufficient. Indeed, it seems that the fact that the daughter lived with the parent for a time during the period of pregnancy and parturition, is of itself sufficient to raise a presumption of service. This, however, may be rebutted by proof that she lived with the parent as boarder, or in some other relation than that of mere child or servant. *Ibid.*

4. If the daughter lived with the mother before and at the time the child was born, performing service for her, the mother had a legal right to maintain an action of case for the seduction, although the father, who had died before the birth of the child, was living at the time of the seduction. *Ibid.*

SERVANT.

See Master and Servant. Negligence.

SERVICES.

See Seduction.

SHERIFF'S SALE.

See Lien.

SHERIFF.

See Public Officer.

SHIPPING.

See Bill of Lading. Stoppage in transitu.

SHIP.

See Collision.

SIGNATURE.

See Will.

SPECIFIC PERFORMANCE.

See Agreement.

STATE JUDGE.

See Habeas Corpus.

STATUTE.

See Lien.

STEAM-TUG.

See Admiralty.

STOPPAGE IN TRANSITU.

1. It is the settled rule in the law of stoppage *in transitu* that movable property sold but not paid for, may, on the discovery of the vendee's insolvency before it has come into his possession, be seized by the vendor. Charles B. Campbell et al. *vs.* Robert B. Gabeen, et al., garnishees, 688
2. Where A. shipped blooms to Philadelphia, consigning them to B. & Co. with written instructions to deliver them "to the order of C.," and they were so received and 85 pieces forwarded to C., who subsequently became insolvent, the right of stoppage *in transitu* in A. is gone, inasmuch as the transit was completely at an end when the blooms reached B. & Co., who held them subject to C.'s orders and as his agents; and D. may issue foreign attachment and seize the blooms as C.'s property. *Ibid.*

STREAM.

See Riparian owner.

TAXATION.

See Constitutional Law.

TENDER.

See Pledge.

TERRITORY.

See Claims.

TICKET.

See Railroad.

TIDE.

See Riparian Owner.

TITLE.

See Personal Property. Stoppage in transitu.

TRESPASS.

See Seduction.

TROVER.

See Personal Property.

TRUSTEE.

See Cestui que trust.

UNITED STATES.

See Claims.

USAGE.

See Evidence.

VARIANCE.

When the complaint alleges that the defendant wrongfully diverted the water, while the evidence shows that, though the water was originally diverted by him, he provided means for its return to its natural channel above plaintiff's lands, and that its return was prevented by the act of another person after it left defendant's land, there is no material variance between the allegations and proof. (*Rice, C. J., dissenting.*) *Stein vs. Burden*, - - - - -

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VENDOR.

See Stoppage in transitu.

VESSEL.

See Lien.

WAIVER.

See Evidence.

WARD.

See Attorney. Guardian.

WATER COURSE.

See Riparian Owner.

WATER.

See Riparian Owner.

WILL.

A testator wrote his will, and signed it in the presence of two persons summoned by him for the purpose; they took the will into an adjoining room to sign their names; the rooms communicated by a door, which was left open. There was no proof that the testator did actually see the witnesses sign their names: *Held*, that the signature of the witnesses was not made in the presence of the testator. *Norton vs. Basett*, - - - - -

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WINDMILL ISLAND.

See Mandamus.

WITNESS.

See Will.

WORKMAN.

See Master and Servant.

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